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Reconsidering the Artful Pleading Doctrine

by
ROBERT A. RAGAZZO*

The artful pleading doctrine is utilized by federal courts to transform claims pled under state law into federal claims in order to confer removal jurisdiction.¹ Although a quarter-century old² and little questioned,³ the artful pleading doctrine contradicts both precedent and sound jurisdictional theory. During the past decade, the Supreme Court has decided a string of cases that have enlarged the scope of the artful pleading doctrine. This Article considers the artful pleading doctrine in its original form and its more recent manifestations. It concludes that the artful pleading doctrine is an ill-advised departure from more than a century of established law and should be recanted or limited to the narrowest possible extent.

I. Introduction

A. Federal Question Jurisdiction

Under Article III of the United States Constitution and Title 28 of the United States Code, the federal courts have the power to entertain cases that arise under federal law.⁴ The constitutional grant of jurisdictional power has been interpreted broadly and includes cases that contain any federal component.⁵ The statutory grant of jurisdictional power,

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1. See, e.g., *Travelers Indem. Co. v. Sarkisian*, 794 F.2d 754, 758 (2d Cir.), *cert. denied*, 479 U.S. 885 (1986).

2. The Supreme Court first recognized the artful pleading doctrine in *Avco Corp. v. Aero Lodge No. 735*, 390 U.S. 557 (1968).

3. See *Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394, 397 n.2 (1981) (describing the artful pleading doctrine as a "settled principle"); *Sullivan v. First Affiliated Sec., Inc.*, 813 F.2d 1368, 1372 n.5 (9th Cir.) (describing the artful pleading doctrine as "well-established"), *cert. denied*, 484 U.S. 850 (1987).

4. See U.S. CONST. art. III, § 2, cl. 1; 28 U.S.C. § 1331 (1988).

5. See *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738, 823 (1824).

which has been interpreted more restrictively, is the focus of this Article. As a general rule, "[a] suit arises under the law that creates the cause of action."⁶ Under this rule, the federal district courts have federal question jurisdiction when Congress has created a remedy in a particular area⁷ or the federal courts have implied a remedy from some body of federal law.⁸

There are two exceptions to the general rule. First, a federally created claim does not arise under federal law if it lacks a substantial federal element.⁹ Second, a state created claim does arise under federal law if it contains a substantial federal element.¹⁰ Combining the two exceptions,

6. *American Well Works Co. v. Layne & Bowler Co.*, 241 U.S. 257, 260 (1916) (Holmes, J.).

7. *See, e.g.*, 15 U.S.C. § 15(a) (1988) (granting a private right of action under the anti-trust laws); 15 U.S.C. § 771 (1988) (granting a private right of action to redress certain securities law violations); 18 U.S.C. § 1964 (1988) (granting a private right of action to redress racketeering injuries).

8. The courts have used a variety of sources to create implied federal remedies, including the Constitution, *see, e.g.*, *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971) (recognizing an implied right of action under the Fourth Amendment), statutes, *see, e.g.*, *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353 (1982) (recognizing an implied right of action under the Commodity Exchange Act, 7 U.S.C. §§ 1-24 (Supp. I 1978)), and administrative regulations, *see, e.g.*, *Herman & MacLean v. Huddleston*, 459 U.S. 375 (1983) (accepting the existence of a private right of action under SEC rule 10b-5, 17 C.F.R. § 240.10b-5 (1982)).

9. *See, e.g.*, *Shoshone Mining Co. v. Rutter*, 177 U.S. 505, 509 (1900) (holding that claims to enforce federally created land titles did not arise under federal law because Congress made such titles dependent on local standards); *T.B. Harms Co. v. Eliscu*, 339 F.2d 823, 825-27 (2d Cir. 1964) (Friendly, J.) (holding that a federally created copyright claim did not arise under federal law when the only issues in the case related to the validity of state law defenses), *cert. denied*, 381 U.S. 915 (1965). It has been suggested that a federally created claim does not arise under federal law unless some federal element of the plaintiff's claim is disputed. *See, e.g.*, *Gully v. First Nat'l Bank*, 299 U.S. 109, 113-14 (1936) (Cardozo, J.); *Shulthis v. McDougal*, 225 U.S. 561, 569-70 (1912). This view is questionable because it makes the existence of federal question jurisdiction turn on whether the defendant's answer disputes the federal elements of the plaintiff's claim. *See* PAUL M. BATOR ET AL., *HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 999 (3d ed. 1988); 13B CHARLES ALAN WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE* § 3562, at 27 (2d ed. 1984).

10. *See, e.g.*, *Smith v. Kansas City Title & Trust Co.*, 255 U.S. 180, 199-202 (1921) (holding that a state claim to enjoin a corporation from investing in certain federal bonds arose under federal law when the plaintiff alleged that the federal statute authorizing issuance of the bonds was unconstitutional). *Smith* was called into question by *Merrell Dow Pharmaceuticals, Inc. v. Thompson*, 478 U.S. 804 (1986), in which the Supreme Court found that there was no federal question jurisdiction over a state tort claim that alleged misbranding of a drug in violation of the Federal Food, Drug, and Cosmetic Act, 21 U.S.C. §§ 301-394 (1982 & Supp. III 1985). The Court held that the federal element of the plaintiff's claim was insubstantial because there was no private right of action under the Federal Food, Drug, and Cosmetic Act. *Thompson*, 478 U.S. at 814. Based on *Thompson*, lower courts have refused to exercise federal jurisdiction when the plaintiff lacks an actionable federal claim. *See* *Smith v. Industrial Valley Title Ins. Co.*, 957 F.2d 90, 93 (3d Cir.), *cert. denied*, 112 S. Ct. 3034 (1992); *Willy v. Coastal*

the general rule might be rephrased: federal question jurisdiction exists whenever the plaintiff's claim contains a substantial federal element.¹¹

Because the plaintiff's claim must contain a substantial federal element, the plaintiff cannot assert federal question jurisdiction by anticipating federal defenses to claims based entirely on state law.¹² It makes no difference if the defendant concedes the plaintiff's state claims and the only real controversy relates to the federal defenses.¹³ The rule that one cannot gain access to federal court by pleading or anticipating federal defenses is known as the well-pleaded complaint rule.¹⁴ This rule is over one hundred years old.¹⁵

The standards for removal jurisdiction are generally the same as the standards for original jurisdiction.¹⁶ As a consequence, a defendant cannot create federal question jurisdiction by pleading federal defenses to

Corp., 855 F.2d 1160, 1168 (5th Cir. 1988); *Miller v. Norfolk & W. Ry.*, 834 F.2d 556, 562 (6th Cir. 1987); *Utley v. Varian Assocs.*, 811 F.2d 1279, 1283 (9th Cir.), *cert. denied*, 484 U.S. 824 (1987). After *Thompson*, it is unclear what is left of the rule that federal jurisdiction extends to some state created claims. See *BATOR ET AL.*, *supra* note 9, at 1020. The special rule for state created claims aids plaintiffs only when they do not have a federal claim. There is an independent basis for jurisdiction when there is a private right of action to enforce the federal element of a plaintiff's state claim. The state claim can then be asserted as a pendent claim.

11. The difficulty with lumping the two exceptions together is that after *Thompson*, it is unclear how much remains of the doctrine that a state claim with a substantial federal element arises under federal law. After *Thompson*, it is also questionable whether the substantiality requirement is the same for federal and state created claims. *Thompson* may be viewed as establishing a higher standard of substantiality for the latter. See *supra* note 10.

12. See, e.g., *Franchise Tax Bd. v. Construction Laborers Vacation Trust*, 463 U.S. 1, 9-12 (1983); *Gully*, 299 U.S. at 113; *Louisville & N.R.R. v. Mottley*, 211 U.S. 149, 152-54 (1908).

13. E.g., *Franchise Tax Bd.*, 463 U.S. at 12; *Mottley*, 211 U.S. at 151-52.

14. See, e.g., *Franchise Tax Bd.*, 463 U.S. at 9-10.

15. See *Metcalf v. Watertown*, 128 U.S. 586, 588-90 (1888). The decision in *Metcalf* has been described as inconsequential because under the removal statute then in force, even though the plaintiff could not obtain original jurisdiction based on an anticipated federal defense, either party could remove a state case after a federal defense was actually asserted. See Michael G. Collins, *The Unhappy History of Federal Question Removal*, 71 IOWA L. REV. 717, 731-33 (1986). The first case under the current removal statute to hold that a defendant could not remove a case based on a federal defense was *Tennessee v. Union & Planter's Bank*, 152 U.S. 454 (1894).

16. See 28 U.S.C. § 1441(a) (1988 & Supp. II 1990) (granting removal jurisdiction over "civil action[s] brought in a State court of which the district courts of the United States have original jurisdiction"). In a few circumstances, removal jurisdiction is broader, see, e.g., 28 U.S.C. §§ 1441(c), 1442-1443 (1988 & Supp. II 1990) (allowing removal of separate and independent state claims joined with federal claims, certain actions against federal officers, and certain civil rights cases), or narrower, see, e.g., 15 U.S.C. § 77v(a) (1988) (denying removal of claims brought pursuant to the Securities Act of 1933, 15 U.S.C. §§ 77a-77z (1988)); 28 U.S.C. §§ 1441(b), 1445 (1988) (denying removal of cases involving complete diversity when any defendant is a citizen of the forum state, and cases brought under certain labor laws), than original jurisdiction.

state claims alleged in state court. According to a rule that is at least eighty years old, the plaintiff is the master of his complaint.¹⁷ Thus, a plaintiff may prevent removal by pleading only state claims and ignoring any federal claims he might have.¹⁸ The defendant may not remove the case to federal court by claiming that the plaintiff is forum-shopping by asserting only state claims. The defendant is also barred from removing a case in which a plaintiff asserts only state claims even if federal claims have come to predominate in the particular area of the law.

B. The Artful Pleading Doctrine

The Supreme Court first promulgated the artful pleading doctrine as a challenge to the well-pleaded complaint and master-of-the-complaint rules in *Avco Corp. v. Aero Lodge No. 735*.¹⁹ In *Avco*, the Supreme Court held that a claim pled under state law will be deemed to arise under federal law when the state law on which the plaintiff purports to rely is preempted by federal law, and the only possible relief is federal.²⁰ In these circumstances, the plaintiff may not defeat the defendant's right to removal by failing to plead federal law.²¹

The lower courts attempted to reconcile *Avco* with accepted law by distinguishing between cases in which federal law preempts state claims

17. See, e.g., *Healy v. Sea Gull Specialty Co.*, 237 U.S. 479, 480 (1915) (noting that "the plaintiff is absolute master of what jurisdiction he will appeal to"); *Fair v. Kohler Die & Specialty Co.*, 228 U.S. 22, 25 (1913) (noting that "the party who brings a suit is master to decide what law he will rely upon"). For a criticism of the master-of-the-complaint rule, see A. Mark Segreti, Jr., *The Federal Preemption Question—A Federal Question? An Analysis of Federal Jurisdiction Over Supremacy Clause Issues*, 33 CLEV. ST. L. REV. 653, 675 (1984-1985) [hereinafter Segreti *The Federal Preemption Question*].

18. See, e.g., *Merrell Dow Pharmaceuticals, Inc. v. Thompson*, 478 U.S. 804, 809 n.6 (1986) ("Jurisdiction may not be sustained on a theory that the plaintiff has not advanced."); *Travelers Indem. Co. v. Sarkisian*, 794 F.2d 754, 758 (2d Cir. 1986) ("'[W]here plaintiff's claim involves both a federal ground and a state ground, the plaintiff is free to ignore the federal question and pitch his claim on the state ground' to defeat removal." (quoting 1A JAMES W. MOORE & BRETT A. RINGLE, *MOORE'S FEDERAL PRACTICE* ¶ 0.160, at 185 (2d ed. 1979))), *cert. denied*, 479 U.S. 885 (1986).

19. 390 U.S. 557 (1968).

20. *Id.* at 560.

21. As explained in a leading treatise:

[O]ccasionally the removal court will seek to determine whether the real nature of the claim is federal, regardless of plaintiff's characterization. For instance, in many contexts plaintiff's claim may be one that is exclusively governed by federal law, so that the plaintiff necessarily is stating a federal cause of action, whether he chooses to articulate it that way or not. If the only remedy available to plaintiff is federal, because of preemption or otherwise, and the state court necessarily must look to federal law in passing on the claim, the case is removable regardless of what is in the pleading.

14A WRIGHT ET AL., *supra* note 9, § 3722, at 266-75 (2d ed. 1985) (citations omitted).

and replaces them with parallel federal claims and cases in which federal preemption extinguishes any right to relief. The lower courts tended to allow removal only in the former category.²² Although *Avco* may seem to be consistent with traditional jurisdictional principles, a careful analysis demonstrates that this appearance is an illusion.²³

The Supreme Court paved the way for the potential expansion of *Avco* in *Franchise Tax Board v. Construction Laborers Vacation Trust*.²⁴ One portion of the Court's opinion confirmed the lower courts' rule allowing removal only when federal law preempts a plaintiff's state law claims and simultaneously replaces them with federal claims.²⁵ The opinion also suggests, however, that removal is justified whenever federal law completely preempts state law, without regard to whether federal law replaces the preempted state claims.²⁶ This expansive view of *Franchise Tax Board* is a broad departure from the well-pleaded complaint and master-of-the-complaint rules.²⁷

In 1981, the Supreme Court created a new branch of the artful pleading doctrine. Prior to 1981, most artful pleading cases allowed removal based on federal preemption of state law. In *Federated Department Stores, Inc. v. Moitie*,²⁸ the Supreme Court extended this doctrine by allowing removal of state claims that were not preempted by federal law.²⁹ The Court gave no rationale for its holding, and the lower courts subsequently struggled to supply one.³⁰ The lower courts found it significant that the plaintiff in *Federated Department Stores* had previously pled and lost federal claims based on the same facts as his removed state claims.³¹ It is still unclear whether *Federated Department Stores* legitimizes removal based on a federal res judicata defense or on some other ground.

As a consequence of *Franchise Tax Board*, *Federated Department Stores*, and their progeny, the artful pleading doctrine has been significantly broadened over the last twelve years, and concomitant restrictions have been placed on the well-pleaded complaint and master-of-the-complaint rules. In light of these developments, the time is ripe to examine

22. See *infra* text accompanying notes 47-49.

23. See *infra* text accompanying notes 45-52.

24. 463 U.S. 1 (1983).

25. *Id.* at 26.

26. *Id.* at 23-24.

27. See *infra* text accompanying notes 86-96.

28. 452 U.S. 394 (1981).

29. *Id.* at 397 n.2.

30. See *infra* Part IV.

31. See *infra* Part IV.

the propriety of the artful pleading doctrine in its many guises. Part II of this Article examines the pristine form of the artful pleading doctrine as exemplified by *Avco* and concludes that the doctrine is inconsistent with established law. Part III examines *Franchise Tax Board* and its progeny and concludes that expansion of *Avco* is unjustified. Part IV discusses *Federated Department Stores*' application of the artful pleading doctrine and concludes that *Federated Department Stores* involves an ill-considered expansion of the doctrine.

Given the conflict between the artful pleading doctrine and a century of settled jurisdictional law, Part V considers whether the traditional view exemplified by the well-pleaded complaint and master-of-the-complaint rules or the view espoused by the artful pleading cases is sounder. The Article concludes that courts should follow traditional jurisdictional principles. The artful pleading doctrine should not remain in any form as an exception to the well-pleaded complaint and master-of-the-complaint rules.

II. The Preemption Branch of the Artful Pleading Doctrine

A. Birth of the Doctrine

In *Avco Corp. v. Aero Lodge No. 735*,³² an employer sought a state court injunction against a striking labor union. The employer alleged that the strike violated its collective bargaining agreement with the union, which contained a no-strike clause and required the union to submit certain grievances to binding arbitration.³³ The union removed the case to federal court.³⁴

Even though the plaintiff purported to plead only a state law breach of contract claim based on the collective bargaining agreement, the Supreme Court held that the case fell within the district court's federal question jurisdiction.³⁵ In *Textile Workers Union v. Lincoln Mills*,³⁶ the Court had held that section 301 of the Labor Management Relations

32. 390 U.S. 557 (1968).

33. *Id.* at 558.

34. *Id.*

35. Although the Court held that the case arose under an "Act of Congress regulating commerce," *id.* at 562 (citing 28 U.S.C. § 1337 (1964)), the Court's holding also implies that the action arose under federal law pursuant to 28 U.S.C. § 1331 (1964), the general federal question statute. Now that the jurisdictional amount limitations have been excised from section 1331, see Pub. L. No. 96-486, § 2(a), 94 Stat. 2369 (1980) (codified as amended at 28 U.S.C. § 1331 (1988)), section 1337 has ceased to have independent significance and is simply a more specific application of section 1331. See, e.g., *Franchise Tax Bd.*, 463 U.S. at 8 n.7.

36. 353 U.S. 448 (1957).

Act³⁷ preempted all state claims to enforce collective bargaining agreements and mandated that all such claims be governed by federal common law.³⁸ Applying *Lincoln Mills*, the *Avco* Court held that the plaintiff's breach of contract claim arose under federal common law and was removable on this basis.³⁹

The *Avco* Court explained that it was irrelevant that the specific relief sought by the plaintiff was not available in federal court.⁴⁰ Federal courts are precluded from issuing injunctions in labor disputes under section 4 of the Norris-LaGuardia Act.⁴¹ The Court did not decide whether a state court applying federal common law to an action for breach of a collective bargaining agreement would be similarly disabled from issuing an injunction.⁴² The Court treated the jurisdictional question as distinguishable from the relief question; therefore, once the case was properly identified as one arising under federal law, it was removable.⁴³ Although the district court lacked the power to grant the specific relief requested by the plaintiff, it had the power to grant other relief.⁴⁴

37. 29 U.S.C. § 185 (1952).

38. See *Lincoln Mills*, 353 U.S. at 456-57. Although section 301 simply gave the federal courts jurisdiction to entertain "[s]uits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce," 29 U.S.C. § 185(a) (1952), the Court believed that this jurisdictional grant embodied a congressional policy that peaceful labor relations would be promoted through the application of a uniform federal law to all collective bargaining questions. *Lincoln Mills*, 353 U.S. at 455.

39. *Avco Corp. v. Aero Lodge No. 735*, 390 U.S. 557, 560 (1968). *Avco* seemingly contradicts two Supreme Court cases decided within the seven years preceding it. In *Pan American Petroleum Corp. v. Superior Court*, 366 U.S. 656 (1961), the Court held that a state court had jurisdiction to consider a state claim that was arguably preempted and replaced by a federal claim that was within the exclusive jurisdiction of the federal courts. *Id.* at 662-64. The Court noted that it would not second-guess the plaintiff's characterization of his claim. *Id.* In *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966), the Court explained that federal preemption of a state labor claim does not create federal jurisdiction. *Id.* at 727. Nevertheless, a number of lower courts anticipated *Avco*. See *Johnson v. England*, 356 F.2d 44, 47-48 (9th Cir.), cert. denied, 384 U.S. 961 (1966); *Pollio & Son, Inc. v. International Bhd. of Teamsters*, 242 F. Supp. 684, 684-86 (E.D.N.Y. 1965); *Table Talk Pies v. Strauss*, 237 F. Supp. 514, 517-19 (S.D.N.Y. 1964); *Central Metal Prods. v. International Union*, 195 F. Supp. 70, 71-72 (E.D. Ark. 1961); *Fay v. American Cystoscope Makers, Inc.*, 98 F. Supp. 278, 280-81 (S.D.N.Y. 1951).

40. *Avco*, 390 U.S. at 561.

41. 29 U.S.C. § 104 (1968).

42. *Avco*, 390 U.S. at 560 n.2.

43. See *id.* at 561.

44. For example, the district court had the power to grant specific performance of an agreement to arbitrate, enforcement of an arbitration award, or compensatory damages. See *id.* Of course, the plaintiff would have been entitled to such relief even if injunctive relief had been the only relief prayed for in the complaint. See FED. R. CIV. P. 54(c).

B. The Replacement Preemption Model

Avco, a unanimous decision of the United States Supreme Court, did not even discuss the well-pleaded complaint and master-of-the-complaint rules. One must assume that the Court believed the result was obvious and did not disturb settled law. *Avco* may appear to be consistent with the master-of-the-complaint rule. If, as in *Avco*, the only claim available to the plaintiff is federal, the plaintiff has no choice but to bring a federal claim. The master-of-the-complaint rule, therefore, seems to have no application.⁴⁵ The plaintiff would presumably prefer having his complaint removed to having his complaint dismissed based on federal preemption.⁴⁶

The well-pleaded complaint rule, which provides that removal is not permitted based on the assertion of federal defenses, is more difficult to reconcile with *Avco*. Prior to *Franchise Tax Board*, the lower courts attempted to reconcile the well-pleaded complaint rule and the artful pleading doctrine by distinguishing between two types of federal preemption.⁴⁷ The lower courts allowed removal when federal law not only pre-

45. See *Travelers Indem. Co. v. Sarkisian*, 794 F.2d 754, 758 (2d Cir.), cert. denied, 479 U.S. 885 (1986). Although the *Avco* branch of the artful pleading doctrine has usually been applied in preemption cases, it should also apply to all cases in which the plaintiff's only possible relief is federal. See 14A WRIGHT ET AL., *supra* note 21, § 3722, at 273-74 (noting that removal based on the artful pleading doctrine is appropriate whenever "the only remedy available to plaintiff is federal, because of preemption or otherwise"). If the plaintiff relies on a state law theory that does not exist, and federal law supplies a basis for the claim, a federal court should allow removal based on *Avco*. See *Mechanical Rubber & Supply Co. v. American Saw & Mfg. Co.*, 747 F. Supp. 1292, 1295-96 (C.D. Ill. 1990) (allowing removal under federal antitrust law because plaintiff alleged interstate antitrust violations and state antitrust law applied only to intrastate violations); *La Buhn v. Bulkmatc Transp. Co.*, 644 F. Supp. 942, 947-48 (N.D. Ill. 1986) (allowing removal only if state labor claim held not to exist), *aff'd*, 865 F.2d 119 (7th Cir. 1988); *Fisher v. CPC Int'l, Inc.*, 591 F. Supp. 228, 229 (W.D. Mo. 1984) (construing a claim as arising under federal law because state law provided no remedy for age discrimination); *In re Wiring Device Antitrust Litig.*, 498 F. Supp. 79, 82-83 (E.D.N.Y. 1980) (allowing removal of a claim pled under state antitrust law because the complaint implicated interstate commerce and state law was limited to transactions in intrastate commerce).

46. See Mary P. Twitchell, *Characterizing Federal Claims: Preemption, Removal, and the Arising-Under Jurisdiction of the Federal Courts*, 54 GEO. WASH. L. REV. 812, 824-25 (1986).

47. Some lower courts did not distinguish between types of preemption and allowed removal without regard to whether federal law provided replacements for preempted state claims. See *Gunter v. AGO Int'l B.V.*, 533 F. Supp. 86, 88-90 (N.D. Fla. 1981); *Palm Beach Co. v. Journeymen's and Prod. Allied Servs. Int'l Union Local 157*, 519 F. Supp. 705, 708 (S.D.N.Y. 1981); *Billy Jack for Her, Inc. v. New York Coat Workers' Union Local 1-35*, 511 F. Supp. 1180, 1187 (S.D.N.Y. 1981); *Bailey v. First Fed. Sav. & Loan Ass'n*, 467 F. Supp. 1139, 1141-42 (C.D. Ill. 1979); *New York v. Local 144*, 410 F. Supp. 225, 229 (S.D.N.Y. 1976); *Ulichny v. General Elec. Co.*, 309 F. Supp. 437, 440 (N.D.N.Y. 1970). The *Billy Jack* case articulated a choice-of-law theory that is a precursor of the complete preemption model suggested by later Supreme Court cases. 511 F. Supp. at 1187; see *infra* text accompanying notes 92-93.

empted state claims but also replaced them with parallel federal claims.⁴⁸ When federal preemption simply extinguished the plaintiff's state claims, the lower courts viewed preemption as defensive and did not permit removal.⁴⁹ I shall refer to the view that removal is permitted only if federal

48. See *Minot Builders Supply Ass'n v. Teamsters Local 123*, 703 F.2d 324, 327 (8th Cir. 1983); *Fristoe v. Reynolds Metals Co.*, 615 F.2d 1209, 1212 (9th Cir. 1980); *Sheeran v. General Elec. Co.*, 593 F.2d 93, 96-97 (9th Cir.), *cert. denied*, 444 U.S. 868 (1979); *North Am. Phillips Corp. v. Emery Air Freight Corp.*, 579 F.2d 229, 233-34 (2d Cir. 1978); *American Synthetic Rubber Corp. v. Louisville & N.R.R.*, 422 F.2d 462, 465-66 (6th Cir. 1970); *Calhoon v. Bonnabel*, 560 F. Supp. 101, 107-08 & n.14 (S.D.N.Y. 1982); *Holder v. Pet Bakery Div.*, 558 F. Supp. 287, 288-89 (N.D. Ga. 1982); *Alameda Room, Inc. v. Pitta*, 538 F. Supp. 1072, 1075-77 (S.D.N.Y. 1982); *Neiger v. Sheet Metal Workers Int'l Ass'n*, 470 F. Supp. 622, 625-27 (W.D. Mo. 1979); *First Fed. Sav. & Loan Ass'n of Jackson County v. First Fed. Sav. & Loan Ass'n of Huntsville*, 446 F. Supp. 210, 212 (N.D. Ala. 1978); *Bains v. Hartford Fire Ins. Co.*, 440 F. Supp. 15, 16 (N.D. Ga. 1977); *Papadopoulos v. Sheraton Park Hotel*, 410 F. Supp. 217, 218-19 (D.D.C. 1976); *Rettig v. Arlington Heights Fed. Sav. & Loan Ass'n*, 405 F. Supp. 819, 822-23 (N.D. Ill. 1975); *Bowman, Inc. v. Norfolk & W. Ry.*, 403 F. Supp. 389, 390-91 (W.D. Pa. 1975); *Sweeney v. Morgan Drive Away, Inc.*, 394 F. Supp. 1216, 1217-18 (D. Colo. 1975); *Oquendo v. Dorado Beach Hotel Corp.*, 382 F. Supp. 516, 517-19 (D.P.R. 1974); *Day-Brite Lighting Div. v. International Bhd. of Elec. Workers*, 303 F. Supp. 1086, 1092-93 (N.D. Miss. 1969); *Roper Corp. v. Office & Professional Employees Int'l Union*, 300 F. Supp. 105, 106-07 (S.D. Ohio 1969); *Espino v. Volkswagen, Inc.*, 289 F. Supp. 979, 983 (D.P.R. 1968).

A number of cases prior to *Franchise Tax Board* permitted removal of state claims that had been preempted by federal law and replaced by federal claims that were within the exclusive jurisdiction of a federal agency. See *Beers v. Southern Pac. Transp. Co.*, 703 F.2d 425, 427 (9th Cir. 1983); *Schroeder v. Trans World Airlines, Inc.*, 702 F.2d 189, 191 (9th Cir. 1983); *McKinney v. International Ass'n of Machinists*, 624 F.2d 745, 747 (6th Cir. 1980). These cases may be viewed as an application, rather than a rejection, of the replacement preemption model. See *infra* text accompanying notes 153-157.

49. See *First Fed. Sav. & Loan Ass'n v. Brown*, 707 F.2d 1217, 1220 (11th Cir. 1983); *Trent Realty Assocs. v. First Fed. Sav. & Loan Ass'n*, 657 F.2d 29, 34-35 (3d Cir. 1981); *Madsen v. Prudential Fed. Sav. & Loan Ass'n*, 635 F.2d 797, 800-03 (10th Cir. 1980); *La Chemise Lacoste v. Alligator Co.*, 506 F.2d 339, 345-46 (3d Cir. 1974), *cert. denied*, 421 U.S. 937 (1975); *Tom Lazio Fish Co. v. Castle & Cooke, Inc.*, 557 F. Supp. 559, 561-62 (N.D. Cal. 1983); *Dean Witter Reynolds, Inc. v. Schwartz*, 550 F. Supp. 1312, 1313-14 (S.D. Fla. 1982); *Charrier v. Bell*, 547 F. Supp. 580, 582-83 (M.D. La. 1982); *Eureka Fed. Sav. & Loan Ass'n v. Flynn*, 534 F. Supp. 479, 481 (N.D. Cal. 1982); *Schultz v. Coral Gables Fed. Sav. & Loan Ass'n*, 505 F. Supp. 1003, 1008-11 (S.D. Fla. 1981); *Turner v. Bell Fed. Sav. & Loan Ass'n*, 490 F. Supp. 104, 105 (N.D. Ill. 1980); *Long Island R.R. v. United Transp. Union*, 484 F. Supp. 1290, 1293 (S.D.N.Y. 1980); *Mabray v. Velsicol Chem. Corp.*, 480 F. Supp. 1240, 1244-45 (W.D. Tenn. 1979); *City of Winston-Salem v. Chauffeurs Local Union No. 391*, 470 F. Supp. 442, 447-48 (M.D.N.C. 1979); *Nevada v. King*, 463 F. Supp. 749, 751-52 (D. Nev. 1979); *Marquette Nat'l Bank v. First Nat'l Bank*, 422 F. Supp. 1346, 1352-53 (D. Minn. 1976); *Committee of Interns & Residents v. New York State Labor Relations Bd.*, 420 F. Supp. 826, 831-32 (S.D.N.Y. 1976); *Gatch v. Hennepin Broadcasting Assocs.*, 349 F. Supp. 1180, 1181 (D. Minn. 1972); *Denver Union Stock Yard Co. v. Litvak Meat Co.*, 295 F. Supp. 809, 811-12 (D. Colo. 1968); see also *Brown & Sharpe Mfg. Co. v. Lodges 1088 & 1142*, 535 F. Supp. 167, 170-71 (D.R.I. 1982) (remanding a state labor law claim because the complaint did not state a valid claim under federal law); *Guinasso v. Pacific First Fed. Sav. & Loan Ass'n*, 656 F.2d 1364, 1367 (9th Cir. 1981) (denying removal because "federal law provides neither the right asserted nor the remedy sought by the present plaintiffs"), *cert. denied*, 455 U.S. 1020 (1982);

law replaces the preempted state claim as the replacement preemption model.

C. *Avco* as a Departure from Established Law

The replacement preemption model is unsuccessful in its attempt to harmonize *Avco* with traditional jurisdictional law. The master-of-the-complaint rule gives the plaintiff the right to insist on asserting his potential state claims and only his potential state claims. In cases in which federal preemption is merely arguable, unlike *Avco*, it is important that the plaintiff have the right to choose the law upon which he will rely.⁵⁰ If the plaintiff insists on asserting only state claims, federal preemption is defensive whether or not the plaintiff has access to other federal claims that he chooses not to assert.⁵¹ If the defendant's preemption challenge is successful, the plaintiff simply loses. The well-pleaded complaint rule requires that removal not be permitted based on the defense of federal preemption.⁵²

First Nat'l Bank v. Aberdeen Nat'l Bank, 627 F.2d 843, 853 (8th Cir. 1980) (noting that *Avco* allows removal only when a state claim has been preempted and "'replaced by a federal right of action'" (quoting 14 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3722, at 80 (Supp. 1978))), cert. denied, 451 U.S. 1018 (1981); Smart v. First Fed. Sav. & Loan Ass'n, 500 F. Supp. 1147, 1155 (E.D. Mich. 1980) (noting that the instant case was unlike *Avco* in which "the facts alleged in plaintiff's complaint were sufficient to support a federal cause of action"); California v. Glendale Fed. Sav. & Loan Ass'n, 475 F. Supp. 728, 732 (C.D. Cal. 1979) (distinguishing cases in which "the facts alleged by the plaintiff actually stated a federal and not a state claim"); New York v. Local 1115 Joint Bd., 412 F. Supp. 720, 723 (E.D.N.Y. 1976) (noting that when "superseding federal law does not replace rights formerly granted by State law, it is illogical to say that the litigant's claim is really predicated on a body of law which grants him no rights").

50. See generally Twitchell, *supra* note 46, at 857-70 (discussing resolution of the removal and preemption questions in cases in which preemption presents a substantial issue).

51. See Sullivan v. First Affiliated Sec., Inc., 813 F.2d 1368, 1372 n.5 (9th Cir.) (noting that "the doctrinal distinction between preemption with and without a federal remedy appears to rationalize a narrow exception to the rule that removal cannot be obtained by a federal defense"), cert. denied, 484 U.S. 850 (1987); Thomas Yamachika, *The Law of Federal "Complete Preemption": A New Brand of Federal-State Conflict*, 41 LAB. L.J. 337, 349 (1990) (noting that the artful pleading doctrine involves an inference that "Congress intended to alter the well-pleaded complaint rule"); Tom M. Williams, Note, *Federated Department Stores v. Moitie: Removal and Relitigation Reappraised*, 1983 WIS. L. REV. 989, 1001; Eric J. Moss, Note, *The Breadth of Complete Preemption: Limiting the Doctrine to its Roots*, 76 VA. L. REV. 1601, 1612 (1990) (arguing that "in *Avco*, the Court made a substantial departure from the established well-pleaded complaint rule").

52. The fact that some lower courts refused to follow *Avco* indicates its departure from established precedent. In *Washington v. American League*, 460 F.2d 654 (9th Cir. 1972), the plaintiff asserted state claims that could also have been brought under the Sherman Antitrust Act, 15 U.S.C. §§ 1-7 (1970), and the defendant removed. The Ninth Circuit held that federal jurisdiction did not exist even if federal antitrust law preempted the state claims (which is clearly not true today, see *California v. ARC Am. Corp.*, 490 U.S. 93, 101 (1989)), because

In order to decide the removal issue, the state court must assess the validity of the preemption defense based on federal law. Indeed, the plaintiff may have chosen the state forum in order to enable a state decisionmaker to rule on the preemption question. There is, however, nothing unusual or improper about this result.⁵³ The well-pleaded complaint rule always requires a state court to decide the validity of federal defenses whenever the plaintiff pleads only state claims.

Moreover, when the plaintiff adheres solely to his potential state claims, he is not abusing the dual court system. If the preemption defense succeeds, the state trial court can decide whether to permit the plaintiff to amend his complaint and assert any federal claims he had originally chosen to forego.⁵⁴ If the state court permits amendment, the defendant can then remove on the basis of federal question jurisdiction.⁵⁵ If the state court does not permit amendment, the consequence of the

"[f]ederal preemption is a matter of defense to a state law claim, and not a ground for removal." *American League*, 460 F.2d at 660. The court did not believe it was inconsistent to disallow removal based upon the kind of replacement preemption that had been present in *Avco* itself.

In *Illinois v. Kerr-McGee Chem. Corp.*, 677 F.2d 571 (7th Cir.), *cert. denied*, 459 U.S. 1049 (1982), the Seventh Circuit took a stronger position. In that case, the State of Illinois sued Kerr-McGee, which operated facilities registered with the Atomic Energy Commission, in its own courts and alleged improper disposal of waste under Illinois law. *Id.* at 573. Kerr-McGee claimed that the state claims were preempted by federal law and that removal was justified. *Id.* at 574. The Seventh Circuit disagreed and viewed preemption as a potential federal defense that did not justify removal. *See id.* at 577. The Seventh Circuit did not examine whether federal law provided a replacement for the preempted state claims. The court viewed *Avco* as in disrepute and confined it to labor law because the *Avco* Court could not have intended "to effect a wholesale expansion of the federal courts' removal jurisdiction without so much as mentioning over eighty years of judicial precedent to the contrary." *Id.* at 577 n.10. With respect to *Avco* and its progeny, the Seventh Circuit stated: "To the extent these decisions are in conflict with our decision here, we decline to follow them." *Id.* at 577; *see also* Schmidt v. National Org. for Women, 562 F. Supp. 210, 214 (N.D. Fla. 1983) (noting that "the more recent and better reasoned cases hold that preemption is a defense which does not confer removal jurisdiction"); Chappell v. SCA Servs., 540 F. Supp. 1087, 1095 n.3 (C.D. Ill. 1982) (same); Coulston v. International Bhd. of Teamsters, 423 F. Supp. 882, 883-84 (E.D. Pa. 1976) (holding, without any reference to *Avco*, that potential preemption of a state labor claim by federal law did not justify removal); Lowe v. Trans World Airlines, 396 F. Supp. 9, 12 (S.D.N.Y. 1975) (holding that federal preemption always arises as a defense and does not support removal).

53. *See infra* Part V.

54. *Cf.* FED. R. CIV. P. 15(a) (requiring leave of court to amend a complaint after the answer is served but noting that "leave shall be freely given when justice so requires").

55. *See* 28 U.S.C. § 1446(b) (1988) (granting leave to remove a case that was not initially removable so long as the removal petition is filed within thirty days of the filing of the amended pleading that made the case removable); *Travelers Indem. Co. v. Sarkisian*, 794 F.2d 754, 758 n.6 (2d Cir.), *cert. denied*, 479 U.S. 885 (1986); *cf.* Sarnelli v. Tickle, 556 F. Supp. 557, 562 (E.D.N.Y. 1983) (noting that removal is only appropriate after a state court has decided the question of federal preemption in the defendant's favor).

plaintiff's decision to forego federal claims depends on the requirements of the state's res judicata law.⁵⁶

Res judicata will generally apply if: the potential federal claim is within the concurrent jurisdiction of the state courts;⁵⁷ the state court considers dismissal for failure to state a claim to be a decision on the merits for purposes of preclusion;⁵⁸ and all claims arising out of the same transaction as the plaintiff's original claim are barred under the state court's res judicata rules.⁵⁹ If the plaintiff is not barred from asserting his potential federal claim in a second lawsuit, this result should be addressed pursuant to the state's res judicata law rather than federal removal law.⁶⁰

56. The preclusive effect of a state court's judgment upon a subsequent case is governed by the law of the rendering state. If the second case is in a different state tribunal, the Full Faith and Credit Clause, U.S. CONST. art. IV, § 1, requires the second state to give the same preclusive effect to the judgment as would the courts of the rendering state. *See, e.g.,* *Fauntleroy v. Lum*, 210 U.S. 230, 236-37 (1908); *Hampton v. M'Connel*, 16 U.S. (3 Wheat.) 234, 235 (1818). If the second forum is federal, the Full Faith and Credit Statute, 28 U.S.C. § 1738 (1988), requires the federal court to give such preclusive effect to the judgment as would the courts of the rendering state. *See, e.g.,* *Migra v. Warren City Sch. Dist. Bd. of Educ.*, 465 U.S. 75, 84 (1984).

57. There is generally no preclusion based on res judicata for failing to bring claims that are not within the forum's subject matter jurisdiction. *See, e.g.,* *Marrese v. American Academy of Orthopaedic Surgeons*, 470 U.S. 373, 382 (1985). The states have the power, however, to preclude claims that are exclusively federal unless Congress intended an exception to the Full Faith and Credit Statute, 28 U.S.C. § 1738 (1988). *See Marrese*, 470 U.S. at 383-86.

58. The federal rule is that a dismissal for failure to state a claim is a decision on the merits for preclusion purposes unless the district court specifies otherwise. *See* FED. R. CIV. P. 41(b); *Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394, 399 n.3 (1981). The states are split on this question. *Compare, e.g.,* *Keidatz v. Albany*, 249 P.2d 264, 265-66 (Cal. 1952) (holding that a dismissal for failure to state a claim is not preclusive) *and* *Hacker v. Beck*, 91 N.E.2d 832, 834 (Mass. 1950) (same) *and* *Rost v. Kroke*, 262 N.W. 450, 452 (Minn. 1935) (same) *and* *Allston v. Incorporated Village*, 267 N.Y.S.2d 564, 565-66 (App. Div. 1966) (same) *with* *Jefferson v. Greater Anchorage Area Borough*, 451 P.2d 730, 732-33 (Alaska 1969) (holding that a dismissal for failure to state a claim is on the merits for purposes of preclusion) *and* *Greene v. Central of Ga. Ry.*, 38 S.E. 360, 360-61 (Ga. 1901) (same) *and* *Lamb v. McConkey*, 40 N.W. 77, 78 (Iowa 1888) (same) *and* *Powell v. Chastain*, 359 P.2d 336, 339 (Okla. 1961) (same). *See also* RESTATEMENT (SECOND) OF JUDGMENTS § 19 cmt. d (1982) (adopting the federal rule).

59. *See* RESTATEMENT (SECOND) OF JUDGMENTS § 24 (1982).

60. *Cf. Twitchell, supra* note 46, at 826-27 (noting that if the artful pleading doctrine is derived "solely out of a sense of fairness to defendant, it would seem fair to permit plaintiff to press her state claim in state court, using principles of waiver and res judicata to protect defendant from additional litigation of any federal claims plaintiff might subsequently assert" (footnote omitted)).

D. Justifying *Avco* on Grounds of Necessity

In *Travelers Indemnity Co. v. Sarkisian*,⁶¹ the Second Circuit suggested a rationale for *Avco* in light of settled jurisdictional law. The court acknowledged that federal preemption would appear always to be a defense.⁶² The court noted, however, that it might be necessary to allow removal because, under certain circumstances, the state court might not feel compelled to decide the preemption question.⁶³ Consider the following scenario: The plaintiff has asserted only a state claim that is arguably preempted by federal law. If it is preempted, the state claim is replaced by a parallel federal claim, and the state court has concurrent jurisdiction over the replacement federal claim.⁶⁴ If the state court follows the federal rules that the plaintiff is not required to plead law⁶⁵ and may receive the relief to which he is entitled regardless of his prayer,⁶⁶ and if the plaintiff establishes the facts pled in his complaint, he will necessarily be entitled to relief from the state court. Whether that relief flows from state or federal law may seem irrelevant to the state court. As a consequence, the state court may refuse to decide the preemption question.⁶⁷

61. 794 F.2d 754 (2d Cir.), *cert. denied*, 479 U.S. 885 (1986).

62. *See id.* at 758 n.6.

63. *See id.*

64. There was, for example, concurrent jurisdiction over the replacement federal claim in *Avco* itself. *See Charles Dowd Box Co. v. Courtney*, 368 U.S. 502, 506 (1962). Some have argued that the strongest case for artful pleading removal occurs when state claims are preempted by claims that are exclusively federal. *See Salveson v. Western States Bankcard Ass'n*, 525 F. Supp. 566, 572 (N.D. Cal. 1981), *aff'd in part and rev'd in part*, 731 F.2d 1423 (9th Cir. 1984); Stanley Blumenfeld, Jr., Comment, *Artful Pleading and Removal Jurisdiction: Ferreting Out the True Nature of a Claim*, 35 UCLA L. REV. 315, 341 (1987). In this case, however, federal pre-emption can only be a defense because the state court is not empowered to grant relief on any federal claims that might exist.

65. Federal Rule of Civil Procedure 8(a)(2) requires only "a short and plain statement of the claim showing that the pleader is entitled to relief." A federal complaint "should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). In a state court applying this standard, a plaintiff might fail to plead a federal claim over which the court has concurrent jurisdiction and still obtain relief under the federal claim that replaces the preempted state claim. *Cf. Twitchell*, *supra* note 46, at 824-25 (noting that liberal pleading rules may result in ambiguity regarding the legal bases of claims and may require courts to look beyond the face of the complaint to determine under whose law a particular claim arises).

66. *See* FED. R. CIV. P. 54(c) (providing that "every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in the party's pleadings").

67. In *Oseekey v. Spaulding Fibre Co.*, 655 F. Supp. 1119 (W.D.N.Y. 1987), the plaintiff filed a state claim for breach of an employment agreement. The defendant moved to dismiss on the ground that section 514(a) of the Employee Retirement Income Security Act, 29 U.S.C. § 1144(a) (1982), preempted the state claim. *Oseekey*, 655 F. Supp. at 1120. The plaintiff argued that even if ERISA preempted the state claim, ERISA provided a replacement claim

If federal preemption applies, the plaintiff will have received relief in state court based on the replacement federal claim, and the defendant will have been unfairly deprived of his right to remove the case on federal question grounds.⁶⁸

As the Second Circuit noted in *Travelers*, this rationale is something of an after-the-fact justification of *Avco*, since *Avco* has been applied to allow removal of claims that, if deemed federal, are within the exclusive jurisdiction of the federal courts.⁶⁹ In such instances, the state court must decide the preemption question because it lacks the power to grant relief under federal law. Moreover, even if the replacement federal claim is within the concurrent jurisdiction of the state courts, the state courts should have a duty to decide the federal preemption question to protect the defendant's federal rights. This duty is simply an extension of the supremacy of federal law.⁷⁰ It is similar to the duty imposed on state courts to entertain federal question cases⁷¹ or to follow federal procedures when necessary to protect federal rights.⁷² Therefore, *Avco* cannot be justified as necessary to protect the defendant's right to removal.

E. Conclusion

The attempts to justify *Avco* in light of established precedent are unsuccessful. *Avco* contradicts the well-pleaded complaint and master-of-the-complaint rules. Either the *Avco* decision is misguided or these rules must be abandoned in whole or in part.

that was within the state court's concurrent jurisdiction. *Id.* The state court denied the motion to dismiss and does not appear to have decided the preemption question. *See id.* The defendant removed, and the district court held that because ERISA supplied an alternative basis for his claim, removal jurisdiction was proper. *Id.* at 1122.

68. *See Travelers Indem. Co. v. Sarkisian*, 794 F.2d 754, 758 n.6 (2d Cir.), *cert. denied*, 479 U.S. 885 (1986).

69. *See id.*; *In re Snap-On Tools Corp.*, 720 F.2d 654, 655 (Fed. Cir. 1983) (allowing removal of a patent claim that was exclusively federal).

70. *See* U.S. CONST. art. VI, cl. 2.

71. In *Testa v. Katt*, 330 U.S. 386 (1947), the Supreme Court held that state courts must entertain federal claims over which they have jurisdiction as long as they entertain similar claims arising under state law. *Id.* at 394.

72. *See, e.g., Felder v. Casey*, 487 U.S. 131, 138 (1988) (holding that Wisconsin may not apply its notice of claim statute to a federal civil rights action filed in state court); *Dice v. Akron, C. & Y.R.R.*, 342 U.S. 359, 362-63 (1952) (requiring state courts to grant a jury trial in actions arising under the Federal Employers' Liability Act, 45 U.S.C. §§ 51-60 (1952)).

III. Potential Expansion of the Preemption Branch of the Artful Pleading Doctrine

A. *Franchise Tax Board* and the Complete Preemption Model

In *Franchise Tax Board v. Construction Laborers Vacation Trust*,⁷³ the Supreme Court paved the way for an expansion of the artful pleading doctrine. The Franchise Tax Board, a California governmental agency, brought suit in state court seeking to levy against the assets of a trust that provided vacations to union members in accordance with a collective bargaining agreement. The levy was designed to satisfy the personal tax liabilities of certain union members. The Board based this action on the provisions of the California Tax Code requiring obligors of delinquent taxpayers to forward assets owed the taxpayers to the state.⁷⁴

The Trust removed the case to federal court relying in part on the artful pleading doctrine.⁷⁵ The Trust argued that the Board relied on state law that related to an employee benefit plan and was therefore preempted by section 514(a) of the Employee Retirement Income Security Act of 1974 (ERISA).⁷⁶ The Trust contended that such preemption provided a basis for removal.⁷⁷ The Supreme Court did not agree with the Trust's analysis and held that the case did not fall within the district court's removal jurisdiction.⁷⁸

One portion of the Court's opinion in *Franchise Tax Board* seemed to accept the replacement preemption model of artful pleading removal. For removal to be proper under this model, ERISA would have had to preempt the state claims and replace them with federal claims.⁷⁹ The Court noted that ERISA did not provide a federal claim to the Franchise Tax Board because state agencies do not have standing to enforce ERISA.⁸⁰ As a consequence, any federal preemption of the Franchise Tax Board's claim was purely defensive and did not supply a ground for removal.⁸¹

73. 463 U.S. 1 (1983).

74. *Id.* at 4-5.

75. *Id.* at 7.

76. 29 U.S.C. § 1144(a) (1982).

77. *See Franchise Tax Bd.*, 463 U.S. at 24.

78. *Id.* at 27-28.

79. *See supra* text accompanying notes 47-49.

80. *See Franchise Tax Bd.*, 463 U.S. at 25.

81. *See id.* at 26 (distinguishing *Avco* on the ground that "ERISA does not provide an alternative cause of action in favor of the State to enforce its rights"); Segreti, *The Federal Preemption Question*, *supra* note 17, at 692 (arguing that "the *Franchise Tax Board* decision permits federal jurisdiction only if [federal law] replace[s] the state cause of action").

Other language in *Franchise Tax Board*, however, suggests a different reason for denying removal. The Court explained that the result in *Avco* was based on the fact that "the preemptive force of § 301 is so powerful as to displace entirely any state cause of action."⁸² The Court also noted that removal is proper whenever "a federal cause of action completely preempts a state cause of action."⁸³ From this perspective, the Court denied removal because the preemptive scope of ERISA was not comparable to that of section 301 of the Labor Management Relations Act.⁸⁴ The opinion suggests that removal may turn on the character of federal preemption rather than on whether federal law provides replacements for preempted state claims. I shall refer to this theory as the complete preemption model.⁸⁵

The scope of "complete preemption" is not clear. Because federal law is supreme,⁸⁶ "state law is preempted if that law actually conflicts with federal law."⁸⁷ State law is also preempted when it "stands as an obstacle to the accomplishment of the full purposes and objectives of Congress."⁸⁸ Finally, even if there is no direct or implicit conflict between federal and state law, state law is preempted "if federal law so thoroughly occupies a legislative field as to make reasonable the inference that Congress 'left no room for the States to supplement it.'"⁸⁹ In the context of removal jurisdiction, "complete preemption" presumably refers to Congress's occupation of an entire field of law.⁹⁰

The complete preemption model is a more severe departure from the well-pleaded complaint and master-of-the-complaint rules than the replacement preemption model. Under the replacement preemption model, it may be argued that the plaintiff's claims are necessarily federal.⁹¹ The complete preemption model, which requires only that Con-

82. *Franchise Tax Bd.*, 463 U.S. at 23.

83. *Id.* at 24.

84. *See id.* at 24-26.

85. The courts often use the phrase "complete preemption" to identify any removal based on federal preemption of state law. *See, e.g., Bartholet v. Reishauer A.G.*, 953 F.2d 1073, 1075 (7th Cir. 1992). As used herein, the term refers only to the complete preemption model described in the text.

86. *See* U.S. CONST. art. VI, cl. 2.

87. *Cipollone v. Liggett Group, Inc.*, 112 S. Ct. 2608, 2617 (1992).

88. *California Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572, 581 (1987) (quoting *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248 (1984)) (citations omitted).

89. *Cipollone*, 112 S. Ct. at 2617 (quoting *Fidelity Fed. Sav. & Loan v. De la Cuesta*, 458 U.S. 141, 153 (1982) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947))).

90. *See Deford v. Soo Line R.R.*, 867 F.2d 1080, 1085-86 (8th Cir.), *cert. denied*, 492 U.S. 927 (1989); *Graf v. Elgin, J. & E. Ry.*, 790 F.2d 1341, 1345 (7th Cir. 1986); *Robinson v. Eichler*, 795 F. Supp. 1253, 1259-60 (D. Conn. 1992).

91. *See supra* text accompanying note 45.

gress have occupied the entire field of law into which the plaintiff's claims fall, allows removal in cases in which the plaintiff does not have any federal claim.

One justification of the complete preemption model is based on the order in which the preemption and federal claim questions are addressed. If it is first decided that Congress has completely preempted a particular area of the law, any claim that the plaintiff has must necessarily be federal. Approaching the matter in this order, the plaintiff's claim might be viewed as federal because federal law will determine whether he has any basis for relief.⁹² This explanation of the complete preemption model has been labeled the choice-of-law theory.⁹³

The choice-of-law theory cannot reconcile the conflict between the complete preemption model and established precedent. It allows removal in cases in which it is clear that the plaintiff does not have a federal claim. For a plaintiff to gain access to a federal forum on federal question grounds, he must plead a federal claim whose existence is fairly arguable.⁹⁴ The complete preemption model does not require the existence of a fairly arguable federal claim as a precondition of removal. Because the scope of original and removal jurisdiction are virtually coextensive,⁹⁵ the defendant should not be able to remove a case that the plaintiff had no right to bring in federal court in the first instance.⁹⁶

92. See *Graf*, 790 F.2d at 1345; *Billy Jack for Her, Inc. v. New York Coat Workers' Union Local 1-35*, 511 F. Supp. 1180, 1186-87 (S.D.N.Y. 1981); A. Mark Segreti, Jr., *Vesting the Whole "Arising Under" Power of the District Courts in Federal Preemption Cases*, 37 OKLA. L. REV. 539, 551 (1984) [hereinafter Segreti, *Vesting the Whole*]; Richard E. Levy, Note, *Federal Preemption, Removal Jurisdiction, and the Well-Pleaded Complaint Rule*, 51 U. CHI. L. REV. 634, 663-64 (1984).

93. See *Billy Jack*, 511 F. Supp. at 1187.

94. If the plaintiff's federal claim is frivolous, his complaint will be dismissed for lack of subject matter jurisdiction. If the plaintiff pleads a fairly arguable federal claim that is ultimately determined not to exist, the federal court has subject matter jurisdiction and the dismissal is on the merits. See, e.g., *Hagans v. Lavine*, 415 U.S. 528, 536 (1974); *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 666 (1974); *Bell v. Hood*, 327 U.S. 678, 682 (1946).

95. See 28 U.S.C. § 1441(a) (1988).

96. See *Moss*, *supra* note 51, at 1638 (arguing that artful pleading removal should be limited to cases of replacement preemption). Allowing removal when the plaintiff has no arguable federal claim also conflicts with *Merrell Dow Pharmaceuticals, Inc. v. Thompson*, 478 U.S. 804 (1986), which held that a state law claim alleging violation of a federal statute did not arise under federal law because the federal statute did not provide the plaintiff with a private right of action. See *supra* note 10. The *Thompson* case has been relied upon in the artful pleading context to deny removal in cases in which federal law did not supply replacement claims for preempted state claims. See *Ethridge v. Harbor House Restaurant*, 861 F.2d 1389, 1396 (9th Cir. 1988); *Willy v. Coastal Corp.*, 855 F.2d 1160, 1165-66 (5th Cir. 1988); *Utley v. Varian Assocs.*, 811 F.2d 1279, 1282-83 (9th Cir.), *cert. denied*, 484 U.S. 824 (1987).

The complete preemption model also makes bad law because it is difficult to apply. When federal preemption exists, it bars not only the plaintiff's claim but all claims that are of the same nature, however defined. Even in the most pervasively regulated fields, federal preemption is seldom totally complete.⁹⁷ There is usually some related area in which state law may operate. Thus, resolution of the removal inquiry depends on how one categorizes the field of law that the case implicates. It is difficult, however, to supply principled grounds on which to make such judgments.

For example, as seen in *Avco*, state claims for breach of collective bargaining agreements are preempted by section 301 of the Labor Management Relations Act.⁹⁸ Therefore, if *Avco* is explained pursuant to the complete preemption model, such state claims are removable because federal preemption is complete. Federal labor law does not, however, preempt all state law affecting labor-management relations or even all state law relating to agreements between labor and management. State labor claims that are not based on collective bargaining agreements continue to survive.⁹⁹ Federal preemption is complete only if the universe of claims is defined as those relating to collective bargaining agreements, a choice that appears arbitrary.

Perhaps the Court in *Franchise Tax Board* used the language of complete preemption to refer to situations in which federal law not only preempts state law in a given area but also provides replacement federal claims.¹⁰⁰ If this is the case, *Franchise Tax Board* adopts the replacement preemption model. Much of the language in *Franchise Tax Board* lends itself to this view. In articulating the complete preemption notion, the Court stated that removal is proper whenever "a federal cause of action completely preempts a state cause of action."¹⁰¹ Because the Court referred to the "federal cause of action" as the preempting force rather than federal law generally, it may have been attempting to limit the case to replacement preemption. For example, the Court's discussion of whether ERISA preemption was complete on the instant facts empha-

97. See *Bartholet v. Reishauer A.G.*, 953 F.2d 1073, 1075 (7th Cir. 1992).

98. See *supra* text accompanying note 38.

99. See *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399, 406-10 (1988) (holding that state retaliatory discharge claims are not preempted by federal law); *International Bhd. of Elec. Workers v. Hechler*, 481 U.S. 851, 858 (1987) (noting that state labor claims are barred only if they are "inextricably intertwined with consideration of the terms of [a] labor contract" (quoting *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 213 (1985))).

100. See *Bartholet*, 953 F.2d at 1075 (noting that complete preemption is a "misnomer" and that "[p]reemption is what wipes out state law, but the foundation for removal is the creation of federal law to replace state law").

101. *Franchise Tax Bd. v. Construction Laborers Vacation Trust*, 463 U.S. 1, 24 (1983).

sized that the state of California lacked standing to assert claims under ERISA.¹⁰²

It is difficult to understand the result in *Franchise Tax Board* unless the case is a confirmation of the replacement preemption model. The Court resolved the jurisdictional issue without reaching the merits of the preemption question. If the Court was applying the replacement preemption model, its ability to resolve the jurisdictional question without reaching the merits of the preemption question is entirely understandable.¹⁰³ Once the Court determined that the plaintiff did not have a claim under ERISA, the case clearly had to be dismissed for lack of jurisdiction. If the Court was applying a new complete preemption model, however, it would have had to decide not only whether the plaintiff's state claims were preempted, but also whether they arose in an area that was completely preempted by federal law.¹⁰⁴ The Court's failure to reach the preemption question suggests that it was applying the replacement preemption model.

B. *Metropolitan Life Insurance Co. v. Taylor*

The Court's decision in *Metropolitan Life Insurance Co. v. Taylor*¹⁰⁵ lends further support to the view that *Franchise Tax Board* merely confirmed the replacement preemption model. In *Taylor*, an insured pled a number of contract and tort claims in state court under state law relating to an insurance company's failure to pay benefits pursuant to a disability

102. See *id.* at 25-26.

103. See *id.* at 7. Prior to the Court's decision in *Pilot Life Insurance Co. v. Dedeaux*, 481 U.S. 41 (1987), the scope of ERISA preemption was generally unclear. The lower courts in *Franchise Tax Board* split on the merits of the preemption question, see *Franchise Tax Bd.*, 463 U.S. at 7, and the Ninth Circuit's finding that preemption existed was by a divided court. *Franchise Tax Bd. v. Construction Laborers Vacation Trust*, 679 F.2d 1307 (9th Cir. 1982), *vacated*, 463 U.S. 1 (1983). It can be argued that removal is never proper under the artful pleading doctrine unless federal preemption is clear. Under this rule, the plaintiff would be allowed to stay in state court whenever he has a fairly arguable state claim. This rule would mirror federal jurisdiction principles. See *supra* note 94 and accompanying text. This view was squarely rejected, however, in *Metropolitan Life Insurance Co. v. Taylor*, 481 U.S. 58, 66 (1987).

104. The Court may have resolved the jurisdictional inquiry by determining that any federal preemption was less than complete. In that event, it would have been unnecessary, even under the complete preemption model, to determine whether the state claims were in fact preempted. The Court noted that ERISA did not entirely preempt state law relating to employee benefit plans because it explicitly rejected preemption with regard to state laws governing insurance, banking, and securities. See *Franchise Tax Bd.*, 463 U.S. at 25. *Franchise Tax Board* cannot be based on this theory, however, because the Court allowed removal of a state claim preempted by ERISA despite the disclaimer in *Metropolitan Life Insurance Co. v. Taylor*, 481 U.S. 58 (1987). See *infra* text accompanying notes 112-113.

105. 481 U.S. 58 (1987).

policy that was established under an employee benefit plan.¹⁰⁶ The defendants, the employer and the insurance company, removed the suit to federal court.¹⁰⁷ The Supreme Court held that removal was proper.¹⁰⁸

The Court framed the issue as "whether these state common law claims are not only preempted by ERISA, but also displaced by ERISA's civil enforcement provision."¹⁰⁹ The Court noted that because the plaintiff's state claims related to an employee benefit plan they were preempted unless they came within ERISA's disclaimer of preemption for state laws governing insurance, banking, or securities. The Court held that the plaintiff's state claims were preempted because they were based upon laws of general application rather than laws specifically governing the field of insurance.¹¹⁰ The Court also noted that ERISA's civil enforcement provisions provided the plaintiff with a federal claim to recover the insurance benefits he sought.¹¹¹

Taylor is easily explained under the replacement preemption model. Federal law not only preempted state law but also provided the plaintiff with a replacement federal claim. *Taylor* is distinguishable from *Franchise Tax Board* only on the ground that the facts pled in *Taylor* stated a viable claim under federal law.¹¹²

It is difficult to explain *Taylor* as a case applying the complete preemption model. If the Court had attempted a complete preemption inquiry, it would have had to determine whether the relevant class of claims related to employee benefit plans outside the insurance, banking, and securities areas or to employee benefit plans generally. Only if the former view was accepted would the claims in *Taylor* have been completely preempted. This was an inquiry, however, that the Court saw no need to make.¹¹³

106. *Id.* at 60-61.

107. *Id.*

108. *Id.* at 67.

109. *Id.* at 60.

110. *Id.* at 62.

111. *Id.* at 62-63.

112. *See id.* at 64-65.

113. The *Taylor* Court also allowed removal because it believed that Congress's intent was to allow removal. *See id.* at 64-66 (noting that the legislative history treated ERISA claims "as arising under the laws of the United States in similar fashion to those brought under section 301 of the Labor-Management Relations Act of 1947" (quoting H.R. CONF. REP. NO. 1280, 93d Cong., 2d Sess. 3 (1974))). A number of courts have imposed a Congressional intent requirement before allowing removal under the replacement preemption model. *See Aaron v. National Union Fire Ins. Co.*, 876 F.2d 1157, 1165 (5th Cir. 1989), *cert. denied*, 493 U.S. 1074 (1990); *Railway Labor Executives Ass'n v. Pittsburgh & L.E.R.R.*, 858 F.2d 936, 942 (3d Cir. 1988); *Beers v. North Am. Van Lines*, 836 F.2d 910, 913 n.3 (5th Cir. 1988); *Boyle v. MTV*

C. *Caterpillar, Inc. v. Williams*

The complete preemption model received a new lease on life in *Caterpillar, Inc. v. Williams*.¹¹⁴ In that case, a group of employees filed suit in state court claiming that their employer had promised them long-term employment outside the context of the company's collective bargaining contract.¹¹⁵ The employer removed the suit to federal court on the ground that the suit was preempted by section 301 of the Labor Management Relations Act.¹¹⁶ The Supreme Court held that removal was improper.¹¹⁷

Caterpillar might be read as simply a confirmation of the replacement preemption model. Analyzing the complaint, the Court noted that the plaintiffs had alleged a breach of the company's individual contracts with them, not a breach of any provision of the collective bargaining agreement. As a consequence, the plaintiffs' claims could not have been brought under section 301 because that section only enforces rights deriving from a collective bargaining agreement.¹¹⁸ Having found that no federal claim covered this dispute, the Court dismissed for lack of jurisdiction without determining whether the plaintiffs' state claims were in fact preempted.¹¹⁹

However, portions of the *Caterpillar* opinion portend a revival of the complete preemption model. The Court framed the issue as "whether respondents' state law complaint for breach of individual employment contracts is completely preempted by § 301 of the Labor Management Relations Act."¹²⁰ In discussing the foundation of the artful pleading doctrine, the Court stated: "Once an area of state law has been completely preempted, any claim purportedly based on that preempted state law is considered, from its inception, a federal claim, and therefore arises under federal law."¹²¹ Unlike *Franchise Tax Board*, *Caterpillar* did not emphasize that a federal cause of action, rather than federal law generally, must preempt a state claim for that claim to be considered federal.¹²²

Networks, Inc., 766 F. Supp. 809, 815 (N.D. Cal. 1991); *National Mills, Inc. v. Consolidated Freightways Corp.*, No. Civ.A.90-2399-V, 1991 WL 33467 (D. Kan. Feb. 12, 1991).

114. 482 U.S. 386 (1987).

115. *Id.* at 388-89.

116. *Id.* at 390.

117. *Id.* at 399.

118. *Id.* at 394.

119. *Id.* at 394-99.

120. *Id.* at 388.

121. *Id.* at 393.

122. See *supra* text accompanying note 101.

Although the Court affirmed the Ninth Circuit, the Court felt it necessary to correct the Ninth Circuit's articulation of the replacement preemption model:

The Court of Appeals . . . appears to have held that a case may not be removed to federal court on the ground that it is completely preempted unless the federal cause of action relied upon provides the plaintiff with a remedy. . . .

. . . .
This analysis is squarely contradicted by our decision in *Avco Corp. v. Machinists*, 390 U.S. 557 (1968). We there held that a § 301 claim was properly removed to federal court although, at the time, the relief sought by the plaintiff could be obtained only in state court. . . .

. . . .
Thus, although we affirm the Court of Appeals' judgment, we reject its reasoning insofar as it is inconsistent with *Avco*.¹²³

Although this statement is a dictum, because the Court affirmed the Ninth Circuit's dismissal for lack of jurisdiction, it appears to be a rejection of the replacement preemption model.¹²⁴ If so, the *Caterpillar* Court's refusal to decide whether the state claim at issue was preempted cannot be attributed to the theory that it was unnecessary to decide this question once it was clear that no federal claim existed.¹²⁵ Perhaps the Court believed that complete preemption applied only to claims within the scope of collective bargaining agreements and not to claims for breaches of individual contracts with employers. Having decided that the plaintiffs' claims did not fall within the scope of complete preemption, the Court may have found it unnecessary to consider whether the plaintiffs' claims were actually preempted on some other basis.

In light of the fact that the Court had embraced the replacement preemption model just two months earlier in its unanimous *Taylor* decision, a more limited reading of *Caterpillar* is preferable.¹²⁶ The Court may have meant that the replacement preemption model allows removal whenever federal law arguably replaces the preempted state claim and that federal jurisdiction is not defeated if the plaintiff's federal claim is ultimately held not to exist. This view is in accord with accepted law,¹²⁷ and constitutes a legitimate application of the replacement preemption model.

123. *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 391 n.4 (1987).

124. See Blumenfeld, *supra* note 64, at 335, 351 n.175.

125. See *Caterpillar*, 482 U.S. at 397-98 (noting that defendant would be able to urge federal preemption on remand).

126. See *Tomlin v. Carson Helicopters, Inc.*, 700 F. Supp. 248, 250 (E.D. Pa. 1988) (rejecting "any suggestion that *Caterpillar* abrogates the requirements established by the Court two months earlier in [*Taylor*]").

127. See *supra* note 94 and accompanying text.

Moreover, the *Caterpillar* Court seemed to misapprehend the Ninth Circuit's exposition of the replacement preemption model. Had the Ninth Circuit suggested that removal is allowed only when federal law provides the exact relief requested by the plaintiff, the Court would have been correct in recognizing that this statement contradicts *Avco*.¹²⁸ The Ninth Circuit did not, however, make such a statement. It suggested only that federal law must provide the plaintiff with a claim to replace the preempted state claim.¹²⁹ If the Court believed this statement was incorrect, it misread *Avco*. The *Avco* Court expressly stated that, although the plaintiff could not get his requested relief in federal court, he had viable federal claims and the federal courts had the power to grant other sufficient relief.¹³⁰

D. The View of the Lower Courts

In the aftermath of *Franchise Tax Board* and its progeny, the lower courts had two artful pleading models from which to choose: the replacement preemption model and the complete preemption model. Although the lower courts often decided the removal question without explicitly choosing between these models, most of their decisions are consistent with the replacement preemption model. In general, the lower courts have allowed removal when federal law not only preempts state claims but also at least arguably supplies replacement federal claims.¹³¹

128. See *supra* text accompanying notes 41-44. This limited view of the *Caterpillar* footnote was adopted in *Hawaii v. American Ins. Co.*, Nos. 91-00153 DAE, 91-00197 DAE, 1991 WL 311868 (D. Haw. July 18, 1991).

129. See *Williams v. Caterpillar Tractor Co.*, 786 F.2d 928, 933 (9th Cir. 1986) (noting that the inquiry is whether "federal law provides plaintiff a *cause of action* to remedy the wrong he asserts he suffered" (emphasis added) (quoting *Hunter v. United Van Lines*, 746 F.2d 635, 643 (9th Cir. 1984), *cert. denied*, 474 U.S. 863 (1985))), *aff'd*, 482 U.S. 386 (1987).

130. See *supra* text accompanying notes 41-44.

131. See *In re Amoco Petroleum Additives Co.*, 964 F.2d 706, 709-10 (7th Cir. 1992); *Bartholet v. Reishauer A.G.*, 953 F.2d 1073, 1075-78 (7th Cir. 1992); *Felton v. Unisource Corp.*, 940 F.2d 503, 506-08 (9th Cir. 1991); *Carland v. Metropolitan Life Ins. Co.*, 935 F.2d 1114, 1118-19 (10th Cir.), *cert. denied*, 112 S. Ct. 670 (1991); *Brown v. Connecticut Gen. Life Ins. Co.*, 934 F.2d 1193, 1195-96 (11th Cir. 1991); *McCormick v. AT&T Technologies, Inc.*, 934 F.2d 531, 534-37 (4th Cir. 1991), *cert. denied*, 112 S. Ct. 912 (1992); *DeSantiago v. Laborers Int'l Union Local No. 1140*, 914 F.2d 125, 127-29 (8th Cir. 1990); *Nishimoto v. Federman-Bachrach & Assocs.*, 903 F.2d 709, 713-15 (9th Cir. 1990); *Pruitt v. Carpenters' Local Union No. 225*, 893 F.2d 1216, 1218-19 (11th Cir. 1990); *Kidd v. Southwest Airlines Co.*, 891 F.2d 540, 545-47 (5th Cir. 1990); *Sluder v. United Mine Workers Int'l Union*, 892 F.2d 549, 553-56 (7th Cir. 1989), *cert. denied*, 111 S. Ct. 45 (1990); *Fitzgerald v. Codex Corp.*, 882 F.2d 586, 588 (1st Cir. 1989); *Jackson v. Southern California Gas Co.*, 881 F.2d 638, 641-42 (9th Cir. 1989); *Richardson v. United Steelworkers*, 864 F.2d 1162, 1167-70 (5th Cir.), *cert. denied*, 493 U.S. 803 (1989); *Sorosky v. Burroughs Corp.*, 826 F.2d 794, 798-801 (9th Cir. 1987); *Nordlicht v. New York Tel. Co.*, 799 F.2d 859, 861-62 (2d Cir. 1986), *cert. denied*, 479 U.S. 1055 (1987); *Harper v. San Diego Transit Corp.*, 764 F.2d 663, 666-69 (9th Cir. 1985); *Vantine v.*

They generally have refused to exercise jurisdiction over cases in which federal preemption takes a purely defensive posture.¹³²

Elkhart Brass Mfg. Co., 762 F.2d 511, 516-19 (7th Cir. 1985); *Oglesby v. RCA Corp.*, 752 F.2d 272, 275-78 (7th Cir. 1985); *Eitmann v. New Orleans Pub. Serv.*, 730 F.2d 359, 364-67 (5th Cir.), *cert. denied*, 469 U.S. 1018 (1984); *Hunter Douglas, Inc. v. Sheet Metal Workers Int'l Ass'n Local 159*, 714 F.2d 342, 345-46 (4th Cir. 1983); *Roe v. General Am. Life Ins. Co.*, 712 F.2d 450, 452 (10th Cir. 1983); *Holt v. Tonawanda Coke Corp.*, No. 91-CV-17S, 1992 WL 109096, at *2-*3 (W.D.N.Y. May 6, 1992); *Great Coastal Express, Inc. v. Blue Cross & Blue Shield*, 782 F. Supp. 302, 304-05 (E.D. Va. 1992); *Allstate Ins. Co. v. Operating Eng'rs Local 324 Health Care Plan*, 742 F. Supp. 952, 953-56 (E.D. Mich. 1990); *Sokolowski v. Allied-Signal, Inc.*, 735 F. Supp. 163, 164 (E.D. Pa. 1990); *Charter Medical Corp. v. Friese*, 732 F. Supp. 1160, 1163 (N.D. Ga. 1989); *Gemcraft Homes, Inc. v. Sumurdy*, 688 F. Supp. 289, 291-95 (E.D. Tex. 1988); *Cunningham v. Dixon*, 700 F. Supp. 20, 20-21 (S.D. Ohio 1987); *Citizens Alliance to Save the Southline v. Montana Rail Link*, 672 F. Supp. 1576, 1578-79 (D. Mont. 1987); *Angela Cummings, Inc. v. Purolator Courier Corp.*, 670 F. Supp. 92, 93-94 (S.D.N.Y. 1987); *Cahall v. Westinghouse Elec. Corp.*, 644 F. Supp. 806, 809-11 (E.D. Pa. 1986); *Seamon v. Bell Tel. Co.*, 571 F. Supp. 1073, 1074-75 (W.D. Pa. 1983); *Tolson v. Retirement Comm. of Briggs & Stratton Retirement Plan*, 566 F. Supp. 1503, 1504 (E.D. Wis. 1983).

132. See *Hurt v. Dow Chem. Co.*, 963 F.2d 1143, 1144-45 (8th Cir. 1992); *Oklahoma ex rel. Okla. Tax Comm'n v. Wyandotte Tribe*, 919 F.2d 1449, 1450-51 (10th Cir. 1990), *cert. denied*, 111 S. Ct. 2829 (1991); *Smolarek v. Chrysler Corp.*, 879 F.2d 1326, 1329-35 (6th Cir.) (en banc), *cert. denied*, 493 U.S. 992 (1989); *Allstate Ins. Co. v. 65 Sec. Plan*, 879 F.2d 90, 92-94 (3d Cir. 1989); *Ethridge v. Harbor House Restaurant*, 861 F.2d 1389, 1393-1405 (9th Cir. 1988); *Railway Labor Executives Ass'n v. Pittsburgh & L.E.R.R.*, 858 F.2d 936, 938-43 (3d Cir. 1988); *Willy v. Coastal Corp.*, 855 F.2d 1160, 1164-67 (5th Cir. 1988); *Chuska Energy Co. v. Mobil Exploration & Producing N. Am.*, 854 F.2d 727, 729-32 (5th Cir. 1988); *Beers v. North Am. Van Lines*, 836 F.2d 910, 912-13 (5th Cir. 1988); *United Ass'n of Journeymen & Apprentices of the Plumbing & Pipefitting Indus., Local No. 57 v. Bechtel Power Corp.*, 834 F.2d 884, 886-90 (10th Cir. 1987), *cert. denied*, 486 U.S. 1055 (1988); *Utley v. Varian Assocs.*, 811 F.2d 1279, 1286-88 (9th Cir.), *cert. denied*, 484 U.S. 824 (1987); *Evans v. Missouri Pac. R.R.*, 795 F.2d 57, 58-59 (8th Cir. 1986), *cert. denied*, 481 U.S. 1013 (1987); *Hernandez-Agosto v. Romero-Barcelo*, 748 F.2d 1, 2-4 (1st Cir. 1984); *Powers v. South Cent. United Food & Commercial Workers Unions & Employees Health & Welfare Trust*, 719 F.2d 760, 763-66 (5th Cir. 1983); *Levy v. Medical Servs. Ass'n, C.A. No. 91-6028*, 1992 U.S. LEXIS 11316, at *2-*14 (E.D. Pa. July 27, 1992); *Longoria v. Cearley*, No. Civ.A.91-CA-955, 1991 U.S. Dist. LEXIS 9298, at *2-*8 (W.D. Tex. June 18, 1992); *Wisconsin v. Missionaries to the Preborn*, No. 92-C-614, 1992 U.S. Dist. LEXIS 9096 at *3-*9 (E.D. Wis. June 15, 1992); *Robinson v. Eichler*, 795 F. Supp. 1253, 1259-60 (D. Conn. 1992); *Allergy Diagnostics Lab. v. Equitable*, 785 F. Supp. 523, 525-27 (W.D. Pa. 1991); *Hawaii v. American Ins. Co.*, Nos. 91-00153 DAE, 91-00197 DAE, 1991 WL 311868, at *2-*6 (D. Haw. July 18, 1991); *Barcelona v. Sea Victory Maritime, Civ. A. No. 91-2064*, 1991 WL 323803, at *1-*4 (E.D. La. July 16, 1991); *Boyle v. MTV Networks, Inc.*, 766 F. Supp. 809, 812-16 (N.D. Cal. 1991); *Vail v. Pan Am Corp.*, 752 F. Supp. 648, 654-59 (D.N.J. 1990); *Ford v. Murphy Oil U.S.A., Inc.*, 750 F. Supp. 766, 772-73 (E.D. La. 1990); *Roy v. Ford Motor Co.*, 748 F. Supp. 492, 494-97 (E.D. Mich. 1990); *Romero v. Mason & Hanger-Silas Mason Co.*, 739 F. Supp. 1472, 1474-79 (D.N.M. 1990); *Kansas ex rel. Stephan v. Trans World Airlines*, 730 F. Supp. 366, 367-69 (D. Kan. 1990); *McDonough v. Blue Cross*, 131 F.R.D. 467, 469-72 (W.D. Pa. 1990); *International Ass'n of Machinists, Local Lodge No. 967 v. General Elec. Co.*, 713 F. Supp. 547, 555-58 (N.D.N.Y. 1989); *Glass Molders Int'l Union v. Wickes Co.*, 707 F. Supp. 174, 177-78 (D.N.J. 1989); *Wolst v. American Airlines*, 668 F. Supp. 1117, 1119-20 (N.D. Ill. 1987); *Sharp v. AT&T Communications*, 660 F. Supp. 650, 651-52 (N.D. W. Va. 1987); *Departamento de Asuntos del Consumidor v. Oriental Fed. Sav.*, 648 F. Supp. 1194, 1196 (D.P.R. 1986); *Walker*

The Courts of Appeals have divided on their application of the artful pleading doctrine in the aftermath of *Franchise Tax Board* and its progeny. The Second,¹³³ Third,¹³⁴ Fifth,¹³⁵ Sixth,¹³⁶ Ninth,¹³⁷

v. Ideco, 646 F. Supp. 940, 942-43 (E.D. Tex. 1986); *Austin v. New England Tel. & Tel. Co.*, 644 F. Supp. 763, 765-69 (D. Mass. 1986); *Town of Norwood v. Adams-Russell Co.*, 627 F. Supp. 742, 743-44 (D. Mass. 1986); *Cuomo v. Long Island Lighting Co.*, 589 F. Supp. 1387, 1391-97 (E.D.N.Y. 1984); *Schaeffer v. General Motors Corp.*, 586 F. Supp. 870, 871-73 (E.D. Mich. 1984); *La Freniere v. General Elec. Co.*, 572 F. Supp. 857, 859-62 (N.D.N.Y. 1983); *Martin v. Wilkes-Barre Publishing Co.*, 567 F. Supp. 304, 309-10 (M.D. Pa. 1983).

133. See *Travelers Indem. Co. v. Sarkisian*, 794 F.2d 754, 758 (2d Cir.) (noting that the artful pleading doctrine does not apply when "a defendant argues not only that federal law preempts the state law on which a plaintiff relies but also that federal law provides no relief on the facts the plaintiff has alleged"), *cert. denied*, 479 U.S. 885 (1986).

134. See *Allstate Ins. Co. v. 65 Sec. Plan*, 879 F.2d 90, 93 (3d Cir. 1989) (noting that the artful pleading doctrine applies "when the enforcement provisions of a federal statute create a federal cause of action vindicating the same interest that the plaintiff's cause of action seeks to vindicate"); *Railway Labor Executives Ass'n v. Pittsburgh & L.E.R.R.*, 858 F.2d 936, 942 (3d Cir. 1988) (noting that "[i]f the federal statute creates no federal cause of action vindicating the same interest the plaintiff's state cause of action seeks to vindicate, recharacterization as a federal claim is not possible").

135. See *Aaron v. National Union Fire Ins. Co.*, 876 F.2d 1157, 1165 (5th Cir. 1989) (noting that federal preemption does not provide a ground for removal unless "the statute at issue . . . contains a specific jurisdictional grant . . . to enforce the [preempted] cause of action"), *cert. denied*, 493 U.S. 1074 (1990); *Willy v. Coastal Corp.*, 855 F.2d 1160, 1165 (5th Cir. 1988) (noting that removal under the artful pleading doctrine is improper "unless there [is] a federal cause of action under the preempting federal law"); see also *Aquafaith Shipping, Ltd. v. Jarillas*, 963 F.2d 806, 809 (5th Cir. 1992) (noting that pursuant to the artful pleading doctrine "[t]he court may reconstruct the plaintiff's legal theories, but the court looks only to the pleadings of the plaintiff" to determine jurisdiction). As discussed below, the Fifth Circuit's decision in *Trans World Airlines v. Mattox*, 897 F.2d 773 (5th Cir.), *cert. denied*, 111 S. Ct. 307 (1990), is inconsistent with the replacement preemption model. See *infra* text accompanying notes 158-165. *Mattox*, however, which did not cite or attempt to distinguish *Aaron* or *Willy*, is probably an erroneous decision.

136. In *Cromwell v. Equicor-Equitable HCA Corp.*, 944 F.2d 1272 (6th Cir. 1991), *cert. dismissed*, 1992 U.S. LEXIS 4763 (1992), the Sixth Circuit premised removal jurisdiction on ERISA preemption. Although the court ultimately found that the plaintiff lacked standing to assert an ERISA claim, the court emphasized that such standing was fairly arguable at the time the complaint was filed and that the existence of a fairly arguable federal claim was necessary to support jurisdiction under the artful pleading doctrine. *Id.* at 1277-78.

137. See *Ultramar America, Ltd. v. Dwelle*, 900 F.2d 1412, 1415-16 (9th Cir. 1990); *Ethridge v. Harbor House Restaurant*, 861 F.2d 1389, 1395 (9th Cir. 1988); *Hyles v. Mensing*, 849 F.2d 1213, 1215 (9th Cir. 1988); *Young v. Anthony's Fish Grottos, Inc.*, 830 F.2d 993, 997 (9th Cir. 1987). In *Newberry v. Pacific Racing Ass'n*, 854 F.2d 1142 (9th Cir. 1988), and *Chmiel v. Beverly Wilshire Hotel Co.*, 873 F.2d 1283 (9th Cir. 1989), the Ninth Circuit allowed removal of complaints that did not appear to state claims under federal law. Although the language of the opinions suggests that the complete preemption model was utilized, the opinions say only that removal may be proper even though federal law does not provide the relief requested by the plaintiffs. See *Newberry*, 854 F.2d at 1146; *Chmiel*, 873 F.2d at 1287. It is unclear whether there was a fair argument at the time the complaints were filed that federal law provided the plaintiffs with a claim. Therefore, *Newberry* and *Chmiel* seemingly failed to undercut the replacement preemption cases. Recent district court cases from the Ninth Circuit have continued to follow this model. See *Hawaii v. American Ins. Co.*, Nos. 91-00153

Tenth,¹³⁸ and Eleventh¹³⁹ Circuits have favored the replacement preemption model. The First,¹⁴⁰ Seventh,¹⁴¹ and Eighth¹⁴² Circuits have favored the complete preemption model.

DAE, 91-00197 DAE, 1991 WL 311868, at *2-*6 (D. Haw. July 18, 1991); *Boyle v. MTV Networks, Inc.*, 766 F. Supp. 809, 815 (N.D. Cal. 1991); *California v. Trans World Airlines*, 726 F. Supp. 785, 786 (S.D. Cal. 1989).

138. In *Carland v. Metropolitan Life Insurance Co.*, 935 F.2d 1114 (10th Cir.), *cert. denied*, 112 S. Ct. 670 (1991), the Tenth Circuit held that ERISA preemption justifies removal only when the plaintiff's claims can be asserted under ERISA's civil enforcement provisions. *Id.* at 1118-19. The court ultimately affirmed a judgment for the plaintiff on the merits of a federal claim. *Id.* at 1120-22.

139. In *Hudson Insurance Co. v. American Elec. Corp.*, 957 F.2d 826 (11th Cir. 1992), an insurance company filed a federal action seeking a declaration that its policy did not cover pollution liability imposed by the Environmental Protection Agency. The declaratory judgment action arose under federal law only if an action to enforce the insurance contract would have arisen under federal law. *See id.* at 828. The underlying coercive action (the defendant's action on the insurance contract) would have involved a state contract claim that was arguably preempted by federal law. The Eleventh Circuit held that, since preemption was involved only as a defense, the underlying coercive action would not have arisen under federal law. *Id.* at 829-30. The Eleventh Circuit noted that federal preemption creates federal jurisdiction only when there is a "parallel federal cause of action that the state court litigant could have brought." *Id.* at 830. Although the Eleventh Circuit's opinion involved only the scope of original jurisdiction, it is directly relevant to the scope of the artful pleading doctrine because original and removal jurisdiction are coextensive. Because the insured could not have brought a coercive action against the insurance company in federal court, the insurance company could not have removed such an action to federal court.

140. In *McCoy v. Massachusetts Inst. of Technology*, 950 F.2d 13 (1st Cir. 1991), *cert. denied*, 112 S. Ct. 1939 (1992), the First Circuit allowed removal of a state claim to enforce a mechanic's lien, *id.* at 15 n.1, and held that ERISA did not permit state law to grant preferential treatment to an ERISA benefit plan under a mechanic's lien statute, *id.* at 18-20. Although the court did not discuss the theoretical basis of the artful pleading doctrine, it appears to have applied the complete preemption model.

141. *See Leu v. Norfolk & W. Ry.*, 820 F.2d 825, 827-31 (7th Cir. 1987); *Graf v. Elgin, J. & E. Ry.*, 790 F.2d 1341, 1344-46 (7th Cir. 1986). The status of the artful pleading doctrine in the Seventh Circuit is not entirely clear. Although *Leu* and *Graf* appeared to adopt the complete preemption model, these cases involved preemption of state law by federal claims that, to the extent they existed, were within the primary jurisdiction of the National Railroad Adjustment Board. Therefore, these cases are arguably consistent with the replacement preemption model. *See infra* text accompanying notes 153-157. Moreover, in *Bartholet v. Reishauer A.G.*, 953 F.2d 1073 (7th Cir. 1992), the Seventh Circuit noted, in the context of artful pleading removal, that "[p]reemption is what wipes out state law, but the foundation for removal is the creation of federal law to replace state law." *Id.* at 1075. This language describes the replacement preemption model.

142. *See DeFord v. Soo Line R.R.*, 867 F.2d 1080, 1084-86 (8th Cir.), *cert. denied*, 492 U.S. 927 (1989). *Deford*, like the Seventh Circuit cases applying the complete preemption model, *see supra* note 141, involved removal based upon preemption by federal claims that were within the primary jurisdiction of a federal agency. It is also arguably consistent with the replacement preemption model. Moreover, in *Hurt v. Dow Chemical Co.*, 963 F.2d 1142 (8th Cir. 1992), the Eighth Circuit refused to assert removal jurisdiction because the federal statute that possibly preempted the plaintiff's state tort claim did not provide the plaintiff with a federal claim. *Id.* at 1144-45.

A number of lower court decisions have allowed removal under the artful pleading doctrine and then denied the plaintiff relief under federal law. Most of these cases can be explained in ways that are consistent with the replacement preemption model.

One category of cases involved dismissals of removed claims because state claims were preempted and the plaintiffs had not pled any federal claims.¹⁴³ In these cases, federal law provided potential replacements for the preempted state claims. Therefore, the plaintiffs should have been allowed to seek relief under federal law regardless of their failure to plead federal claims.¹⁴⁴

The federal courts in these cases unnecessarily added insult to injury. Having recharacterized the plaintiffs' state claims as federal claims for removal purposes, the courts were then unwilling to allow the plaintiffs to seek relief under federal law. These cases are unfaithful to the basic artful pleading notion that the plaintiffs' claims were intrinsically federal, however pled. They also contradict Rule 8(a)(2),¹⁴⁵ which does not require the plaintiff to plead the legal theories under which he seeks relief. Unless the plaintiffs were unable to prove any set of facts that would entitle them to federal relief, their complaints should not have been dismissed.¹⁴⁶

A second category of cases allowed removal based on federal preemption and then held on the merits that federal law did not provide the plaintiff with any claims.¹⁴⁷ These cases are not necessarily inconsistent

143. See *Van Camp v. AT&T Info. Sys.*, 963 F.2d 119, 121, 124 (6th Cir. 1992); *Tingey v. Pixley-Richards W., Inc.*, 953 F.2d 1124, 1130-33 (9th Cir. 1992); *Welch v. General Motors Corp. Buick Motor Div.*, 922 F.2d 287, 294 (6th Cir. 1990) (per curiam); *Ramirez v. Inter-Continental Hotels*, 890 F.2d 760, 762-64 (5th Cir. 1989); *Hyles v. Mensing*, 849 F.2d 1213, 1215 (9th Cir. 1988); *Meyer v. Employers Health Ins. Co.*, 722 F. Supp. 547, 553 (E.D. Wis. 1989); see also *Stikes v. Chevron U.S.A., Inc.*, 914 F.2d 1265, 1270 (9th Cir. 1990) (dismissing state claim preempted by section 301 of the Labor Management Relations Act without considering whether federal law provided a remedy), *cert. denied*, 111 S. Ct. 2015 (1991); *Brown v. Southwestern Bell Tel. Co.*, 901 F.2d 1250, 1255-56 (5th Cir. 1990) (same).

144. See *Shannon v. Shannon*, 965 F.2d 542, 552-53 (7th Cir. 1992); *Bartholet v. Reishauer A.G.*, 953 F.2d 1073, 1077-78 (7th Cir. 1992); *Ulrich v. Goodyear Tire & Rubber Co.*, 884 F.2d 936, 938 (6th Cir. 1989); *Fitzgerald v. Codex Corp.*, 882 F.2d 586, 588-89 (1st Cir. 1989); *Ghebreselassie v. Coleman Sec. Serv.*, 829 F.2d 892, 895-96 (9th Cir. 1987), *cert. denied*, 487 U.S. 1234 (1988). Indeed, the courts dismissing complaints for failure to plead federal law usually specified that dismissal was without prejudice and allowed the plaintiff to amend his complaint in order to specify the potential federal grounds for relief. See *Tingey*, 953 F.2d at 1133; *Ramirez*, 890 F.2d at 764; *Meyer*, 722 F. Supp. at 553; see also *Hyles*, 849 F.2d at 1215 (granting summary judgment for the defendant and noting that the plaintiff declined the court's invitation to assert a federal claim after removal).

145. FED. R. CIV. P. 8(a)(2).

146. See *supra* note 65.

147. See *Smith v. Dunham-Bush, Inc.*, 959 F.2d 6, 10-12 (2d Cir. 1992); *McCoy v. Massa-*

with the replacement preemption model inasmuch as federal question jurisdiction attaches when the plaintiff's replacement federal claim is fairly arguable and does not require that a federal claim ultimately be held to exist.¹⁴⁸

A third category of cases involved claims that, once federalized, were clearly barred by a federal defense at the time of removal. This category includes cases dismissing: claims barred by a federal statute of limitations;¹⁴⁹ otherwise valid federal labor claims barred for failure to comply with grievance procedures contained in collective bargaining

chusetts Inst. of Technology, 950 F.2d 13, 18-23 (1st Cir. 1991), *cert. denied*, 112 S. Ct. 1939 (1992); *Cromwell v. Equicor-Equitable HCA Corp.*, 944 F.2d 1272, 1277-78 (6th Cir. 1991), *cert. dismissed*, 1992 U.S. LEXIS 4763 (1992); *Lister v. Stark*, 890 F.2d 941, 944-46 (7th Cir. 1989), *cert. denied*, 111 S. Ct. 579 (1990); *Boren v. N.L. Indus.*, 889 F.2d 1463, 1465-66 (5th Cir. 1989), *cert. denied*, 110 S. Ct. 3283 (1990); *Chmiel v. Beverly Wilshire Hotel Co.*, 873 F.2d 1283, 1285-87 (9th Cir. 1989); *Degan v. Ford Motor Co.*, 869 F.2d 889, 895 (5th Cir. 1989) (federal question jurisdiction an alternative ground for removal); *Newberry v. Pacific Racing Ass'n*, 854 F.2d 1142, 1152 (9th Cir. 1988); *Albert Einstein Medical Ctr. v. National Benefit Fund for Hosp. & Health Care Employees*, 740 F. Supp. 343, 348-52 (E.D. Pa. 1989); *International Bhd. of Teamsters v. Association of Flight Attendants*, 663 F. Supp. 847, 854 (D.D.C. 1987); *Northwest Indus. Credit Union v. Salisbury*, 634 F. Supp. 191, 195 (W.D. Mich. 1986).

148. In *Smith*, *Lister*, and *Degan*, claims for ERISA pension benefits based on oral promises were dismissed by the courts on the ground that ERISA required a writing. See *Smith*, 959 F.2d at 10; *Lister*, 890 F.2d at 944-46; *Degan*, 869 F.2d at 895. The Seventh Circuit's discussion in *Lister* suggests that, although the court dismissed the case, the potential federal claim under ERISA was fairly arguable. See *Lister*, 890 F.2d at 944-46. In *Cromwell*, although the plaintiff ultimately lacked standing to assert a federal claim, the court emphasized that the existence of a fairly arguable federal claim was necessary to support removal jurisdiction. *Cromwell*, 944 F.2d at 1277-78. *Einstein* was explicitly decided under the replacement preemption model and it appears that the plaintiff's claim, although dismissed, arguably stated a federal claim. See *Einstein*, 740 F. Supp. at 348-49. The court granted leave to replead, but it was arguable that the complaint as originally pled encompassed the allegations the court believed had to be added to state a federal claim. See *id.* at 351-52. In *Salisbury*, the court's discussion suggests that the preempted state claims stated arguably viable federal claims. See *Salisbury*, 634 F. Supp. at 193-95. By contrast, in *McCoy*, *Boren*, *Chmiel*, *Newberry*, and *Teamsters*, there did not seem to have been much of an argument that a replacement federal claim existed.

149. See *Adkins v. General Motors Corp.*, 946 F.2d 1201, 1203, 1213 (6th Cir. 1991), *cert. denied*, 112 S. Ct. 1936 (1992); *McCormick v. AT&T Technologies, Inc.*, 934 F.2d 531, 538 (4th Cir. 1991); *M. Nahas & Co. v. First Nat'l Bank*, 930 F.2d 608, 610-11 (8th Cir. 1991); *DeSantiago v. Laborers Int'l Union Local No. 1140*, 914 F.2d 125, 130 (8th Cir. 1990); *Harris v. Alumax Mill Prods.*, 897 F.2d 400, 403-04 (9th Cir.), *cert. denied*, 111 S. Ct. 102 (1990); *Degan*, 869 F.2d at 892-93; *Richardson v. United Steelworkers*, 864 F.2d 1162, 1170 (5th Cir.), *cert. denied*, 493 U.S. 803 (1989); *Paige v. Henry J. Kaiser Co.*, 826 F.2d 857, 862 (9th Cir. 1987), *cert. denied*, 486 U.S. 1054 (1988); *Harper v. San Diego Transit Corp.*, 764 F.2d 663, 669 (9th Cir. 1985); *Carrington v. RCA Global Communications, Inc.*, 762 F. Supp. 632, 637-39 (D.N.J. 1991); *Fisher v. CPC Int'l, Inc.*, 591 F. Supp. 228, 230-33 (W.D. Mo. 1984).

agreements¹⁵⁰ or ERISA plans,¹⁵¹ and claims barred by other federal defenses.¹⁵² These cases are consistent with the replacement preemption model. Federal question jurisdiction attaches if the plaintiff has an arguably valid federal claim. Federal defenses do not prevent the removal of a case to federal court even if it is clear at the time of removal that these defenses will be successful.

In a fourth category of cases, known as forum preemption cases, federal courts allowed the removal of state claims that were preempted by federal claims falling within the primary jurisdiction of federal agencies.¹⁵³ As a consequence, the complaints had to be dismissed for lack of subject matter jurisdiction after removal.¹⁵⁴ The better approach in these

150. See *Margerer v. John Sexton & Co.*, 912 F.2d 525, 531 (1st Cir. 1990); *Jackson v. Southern Cal. Gas Co.*, 881 F.2d 638, 646 (9th Cir. 1989); *Douglas v. American Info. Technologies Corp.*, 877 F.2d 565, 574 (7th Cir. 1989); *Laws v. Calmat*, 852 F.2d 430, 434 (9th Cir. 1988); *Sams v. United Food & Commercial Workers Union*, 835 F.2d 848, 850 (11th Cir. 1988) (per curiam); *Darden v. U.S. Steel Corp.*, 830 F.2d 1116, 1120 (11th Cir. 1987); *Young v. Anthony's Fish Grottos, Inc.*, 830 F.2d 993, 1002 (9th Cir. 1987); *Meier v. Hamilton Standard Elec. Sys.*, 748 F. Supp. 296, 302 (E.D. Pa. 1990); *LaBuhn v. Bulkmatic Transp. Co.*, 644 F. Supp. 942, 948 (N.D. Ill. 1986), *aff'd*, 865 F.2d 119 (7th Cir. 1988).

151. See *Makar v. Health-Care Corp.*, 872 F.2d 80, 82-83 (4th Cir. 1989).

152. See *King v. Hoover Group, Inc.*, 958 F.2d 219, 221-23 (8th Cir. 1992) (dismissing removed claims based on *res judicata*); *Kilmer v. Central Counties Bank*, 623 F. Supp. 994, 998-1002 (W.D. Pa. 1985) (allowing removal under ERISA and granting summary judgment for the defendants because the plaintiffs' ERISA claim had been satisfied by payment).

153. See *DeSantiago v. Laborers Int'l Union Local No. 1140*, 914 F.2d 125, 129-30 (8th Cir. 1990); *Grote v. Trans World Airlines*, 905 F.2d 1307, 1309-11 (9th Cir.), *cert. denied*, 111 S. Ct. 386 (1990); *Beard v. Carrollton R.R.*, 893 F.2d 117, 121-23 (6th Cir. 1989); *Rayner v. Smirl*, 873 F.2d 60, 67 (4th Cir.), *cert. denied*, 493 U.S. 876 (1989); *Deford v. Soo Line R.R.*, 867 F.2d 1080, 1083, 1091 (8th Cir.), *cert. denied*, 492 U.S. 927 (1989); *Leu v. Norfolk & W. Ry.*, 820 F.2d 825, 826, 831-32 (7th Cir. 1987); *Gemmell v. Consolidated Rail Corp.*, No. CIV.A.2:89-1066, 1991 U.S. Dist. LEXIS 7107, at *3-*7 (S.D. Ohio Apr. 12, 1991); *Underwood v. Trans World Airlines*, 710 F. Supp. 78, 84-86 (S.D.N.Y. 1989); *Muenchow v. Parker Pen Co.*, 615 F. Supp. 1405, 1413-16 (W.D. Wis. 1985); *Gray v. Chessie Sys.*, 588 F. Supp. 1334, 1335 (D. Md. 1984); see also *Reid v. United States*, 715 F.2d 1148, 1153-54 (7th Cir. 1983) (allowing removal of claims that, once federalized, were within the exclusive jurisdiction of the United States Court of Claims).

154. See *Andrews v. Louisville & N.R.R.*, 406 U.S. 320, 322-23 (1972). In *Graf v. Elgin, J. & E. Ry.*, 790 F.2d 1341 (7th Cir. 1986), the Seventh Circuit purported to apply the complete preemption model and permitted the removal of a state retaliatory discharge claim on the ground that it was preempted by the Railway Labor Act, 45 U.S.C. §§ 151-163, 181-188 (1982). *Graf*, 790 F.2d at 1344-46. If the complaint had stated a claim under the Railway Labor Act, the plaintiff would have been required to submit his federal claim to arbitration before the National Railroad Adjustment Board. Because the Seventh Circuit believed that federal law did not provide the plaintiff with any claim upon which to seek relief, the court dismissed the complaint on the merits rather than for lack of jurisdiction. *Id.* at 1344, 1347. This result seems erroneous. Once the Seventh Circuit determined that the plaintiff's claim arose under the Railway Labor Act, it should have dismissed the claim for lack of jurisdiction. It was the National Railroad Adjustment Board's responsibility to determine the plaintiff's entitlement to relief, if any. On the removal issue, *Graf* is consistent with the replacement

cases would be to view preemption as defensive and refuse removal since the complaints did not state claims upon which the federal courts were empowered to grant relief.¹⁵⁵ Although some of the forum preemption cases involved an application of the complete preemption model,¹⁵⁶ they are essentially consistent with the replacement preemption model. In these cases, federal preemption extinguished the plaintiff's state claims and replaced them with federal claims, albeit federal claims that were within the jurisdiction of federal agencies rather than the federal courts.¹⁵⁷

In contrast to the above cases, the Fifth Circuit's recent decision in *Trans World Airlines v. Mattox*¹⁵⁸ can only be explained as an application of the complete preemption model.¹⁵⁹ In *Mattox*, the Attorney General of Texas sued Pan American Airlines in state court alleging that Pan American engaged in deceptive advertising practices. Pan American argued that any state regulations in this area were preempted by federal law and removed the case to federal court.¹⁶⁰ The Fifth Circuit held that state law was in fact preempted¹⁶¹ and that removal was proper because

preemption model because it was fairly arguable that the Railway Labor Act provided the plaintiff with a federal claim. Indeed, the Seventh Circuit had previously remanded the case to allow the district court to consider this very question. See *id.* at 1343.

155. See *Ethridge v. Harbor House Restaurant*, 861 F.2d 1389, 1400 (9th Cir. 1988); *Railway Labor Executives Ass'n v. Pittsburgh & L.E.R.R.*, 858 F.2d 936, 942-43 (3d Cir. 1988); *Willy v. Coastal Corp.*, 855 F.2d 1160, 1169 (5th Cir. 1988); *United Ass'n of Journeymen & Apprentices of the Plumbing & Pipefitting Indus., Local No. 57 v. Bechtel Power Corp.*, 834 F.2d 884, 886-87 (10th Cir. 1987), *cert. denied*, 486 U.S. 1055 (1988); *Evans v. Missouri Pac. R.R.*, 795 F.2d 57, 57-58 (8th Cir. 1986), *cert. denied*, 481 U.S. 1013 (1987); *Norton Coal Co. v. UMW*, 387 F. Supp. 50, 52 (W.D. Va. 1974); *Beacon Moving & Storage Inc. v. Local 814, Int'l Bhd. of Teamsters*, 362 F. Supp. 442, 445 (S.D.N.Y. 1972). It should, however, be noted that the Supreme Court once allowed removal of a claim that had to be dismissed on forum preemption grounds without considering the removal issue. See *Andrews*, 406 U.S. at 322-23.

156. See *Deford*, 867 F.2d at 1084-86; *Graf*, 790 F.2d at 1345.

157. See *Rayner*, 873 F.2d at 63 (emphasizing that the statute preempting the plaintiff's state claim provided him with a remedy); *Leu*, 820 F.2d at 830 (allowing removal of claim that could only be evaluated under federal standards); *Graf*, 790 F.2d at 1346 (noting that artful pleading removal is proper when "the worker is covered by a collective bargaining contract and therefore has a potential federal remedy, judicial or arbitrable").

158. 897 F.2d 773 (5th Cir.), *cert. denied*, 111 S. Ct. 307 (1990).

159. For two other cases denying removal that appear to apply the complete preemption model, see *Cablevision of Boston Ltd. Partnership v. Flynn*, 710 F. Supp. 23, 28 (D. Mass.) (denying removal of claim arguably preempted by the federal law regardless of whether federal law provided a replacement claim because "Congress did not intend to 'totally occupy' the field of cable television services"), *aff'd per curiam*, 889 F.2d 377 (1st Cir. 1989), and *Lockport Well & Pump, Inc. v. International Union of Operating Engineers*, 708 F. Supp. 178, 181 n.3 (N.D. Ill. 1989) (denying removal regardless of whether the complaint stated a claim under federal law because state claims were not "completely preempted").

160. *Mattox*, 897 F.2d at 776.

161. *Id.* at 779-83.

federal law occupied the field of airline advertising, and thus left no room for state regulation.¹⁶²

Although the Fifth Circuit did not articulate the artful pleading model it was applying, the court must have applied the complete preemption model because, regardless of whether Pan American violated federal law and whether private plaintiffs have the power to enforce the federal statute that preempted the Texas Attorney General's suit, the Texas Attorney General did not have standing to enforce federal standards.¹⁶³ *Mattox* is contrary to *Franchise Tax Board*, in which a state plaintiff's lack of standing to enforce ERISA was the key factor in denying removal jurisdiction.¹⁶⁴ *Mattox* is also contrary to recent Fifth Circuit cases adopting the replacement preemption model.¹⁶⁵ As a consequence, this case is best seen as wrongly decided.

E. Conclusion

In the last decade, a number of Supreme Court and lower court cases have potentially expanded the artful pleading doctrine. These cases have propounded the complete preemption model as an alternative to the replacement preemption model. When analyzed closely, most of the complete preemption cases are compatible with the replacement preemption model. Because *Avco* is itself an unjustified departure from established law, the best approach is to give the artful pleading doctrine its narrowest possible application pursuant to the replacement preemption model.

IV. The Dual Filing Branch of the Artful Pleading Doctrine

A. *Federated Department Stores, Inc. v. Moitie*

Prior to 1981, the artful pleading doctrine was generally limited to cases in which federal law preempted the state claims upon which a

162. *Id.* at 787-88.

163. See *California v. Trans World Airlines*, 720 F. Supp. 826, 828 (S.D. Cal. 1989).

164. See *supra* text accompanying notes 79-81, 100-102; *Allergy Diagnostics Lab. v. Equitable*, 785 F. Supp. 523, 527 (W.D. Pa. 1991). But see *Texas v. National Council of Allied Employees*, No. CIV.A.92-CA-205, 1992 U.S. Dist. LEXIS 6238 (W.D. Tex. Apr. 27, 1992) (suggesting that if state claims are preempted by ERISA, they may be removed and dismissed for lack of ERISA standing). Similar cases involving attempts by state officials to enforce deceptive advertising standards against airlines have been remanded to state courts. See *Kansas ex rel. Stephan v. Trans World Airlines*, 730 F. Supp. 366, 368 (D. Kan. 1990) (remanding because Congress did not intend to allow removal); *New York v. Trans World Airlines*, 728 F. Supp. 162, 175-81 (S.D.N.Y. 1989) (remanding because federal law did not preempt state law); *California v. Trans World Airlines*, 726 F. Supp. 785, 786 (S.D. Cal. 1989) (applying the replacement preemption model).

165. See *supra* note 135.

plaintiff purported to rely. In *Federated Department Stores, Inc. v. Moitie*,¹⁶⁶ the Court created a new branch of the artful pleading doctrine that was not dependent on federal preemption of state law.

In *Federated Department Stores*, Brown, one of seven plaintiffs, brought a federal action alleging retail price-fixing in the women's clothing industry in violation of section 1 of the Sherman Antitrust Act¹⁶⁷ (*Brown I*). Five other plaintiffs brought similar federal actions. The seventh plaintiff, Moitie, brought a state action based on the same conduct (*Moitie I*). All seven plaintiffs purported to represent a class of purchasers of women's garments. Moitie's case was removed to federal court, and the seven cases were consolidated.¹⁶⁸ The district court dismissed the complaints. The court ruled that the plaintiffs, as purchasers, had not alleged a sufficient injury to their business or property to confer standing under the federal antitrust laws. Five plaintiffs appealed the dismissal. Brown and Moitie did not appeal.¹⁶⁹

Brown and Moitie subsequently filed state court actions based on the same conduct as their original suits and asserted state claims for fraud, unfair business practices, civil conspiracy, and restitution under California law (*Brown II* and *Moitie II*).¹⁷⁰ Both cases were removed to federal court. The district court held that removal was proper and that the claims asserted by Brown and Moitie were barred by res judicata.¹⁷¹

Brown and Moitie appealed the res judicata dismissals to the Ninth Circuit.¹⁷² While these appeals were pending, the Supreme Court decided *Reiter v. Sonotone Corp.*, holding that retail purchasers had standing to enforce the federal antitrust laws.¹⁷³ As a consequence, the five companion cases that had been brought with *Brown I* and *Moitie I* were reversed by the Ninth Circuit and remanded for trial.¹⁷⁴ In *Brown II* and *Moitie II*, the Ninth Circuit held that the district court had subject matter jurisdiction over the removed complaints and that the reversal of the companion cases deprived *Brown I* and *Moitie I* of res judicata effect.¹⁷⁵ The Ninth Circuit reversed the district court's res judicata holding and remanded *Brown II* and *Moitie II* for trial.¹⁷⁶

166. 452 U.S. 394 (1981).

167. 15 U.S.C. § 1 (1976).

168. *Federated Dep't Stores*, 452 U.S. at 395-96.

169. *Id.* at 396.

170. *Id.* at 404-05 (Brennan, J., dissenting).

171. *Id.* at 396-97.

172. *Id.* at 397.

173. 442 U.S. 330 (1979).

174. *Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394, 397 (1981).

175. *Id.* at 397-98 & n.2.

176. *See id.* at 397-98.

The Supreme Court granted certiorari in *Brown II* and *Moitie II*.¹⁷⁷ The appeal in *Moitie II* was voluntarily dismissed prior to the Court's decision.¹⁷⁸ The Court reversed the Ninth Circuit decision in *Brown II* and held that *Brown I* was preclusive despite the reversals in the companion cases. Most of the Court's opinion is devoted to this issue.¹⁷⁹ In a cryptic footnote, however, the Court affirmed the lower courts' view that "at least some of the claims had a sufficient federal character to support removal."¹⁸⁰ The Court accepted the "factual finding" of the lower courts that the plaintiff in *Brown II* "had attempted to avoid removal jurisdiction by 'artful[ly]' casting [his] 'essentially federal law claims' as state-law claims."¹⁸¹

The Court did not explain which of the claims in *Brown II* were federal¹⁸² or why they "had a sufficient federal character to support removal,"¹⁸³ and it is difficult to understand the grounds on which the Court based its jurisdictional holding. Even if Brown's claims in his second lawsuit were construed as state antitrust claims, state antitrust law

177. *Federated Dep't Stores, Inc. v. Moitie*, 449 U.S. 991 (1980).

178. *Federated Dep't Stores*, 452 U.S. at 396 n.1.

179. *Id.* at 398-402.

180. *Id.* at 397 n.2.

181. *Id.* (quoting the district court's opinion).

182. On remand, the Ninth Circuit ruled that all the claims in *Brown II* were federal in nature. *See Brown v. Federated Dep't Stores, Inc.*, 653 F.2d 1266, 1267 (9th Cir. 1981). The Second Circuit subsequently took the view that only Brown's civil conspiracy claim was federal in nature. *Travelers Indem. Co. v. Sarkisian*, 794 F.2d 754, 760 (2d Cir.), *cert. denied*, 479 U.S. 885 (1986).

183. The Court also did not explain in what manner the artful pleading doctrine involves fact-finding by the district court. Prior to *Federated Department Stores*, removal based on the artful pleading doctrine required an analysis of whether a plaintiff's state claims were preempted by federal law and whether such preemption justified removal. These inquiries seem purely legal in nature. *See Federated Dep't Stores*, 452 U.S. at 409 n.5 (Brennan, J., dissenting); *Travelers*, 794 F.2d at 761 n.9. *But see* *Salveson v. Western States Bankcard Ass'n*, 731 F.2d 1423, 1429 (9th Cir. 1984) (applying the clearly erroneous standard of review to an artful pleading determination). Perhaps the Supreme Court meant to refer to a small body of artful pleading law in which courts found the plaintiff's purpose in attempting to avoid federal jurisdiction relevant and allowed removal only if his purpose could be described as fraudulent. *See, e.g., Hunter v. United Van Lines*, 746 F.2d 635, 642-43, 644 n.6 (9th Cir. 1984), *cert. denied*, 474 U.S. 863 (1985); *Villarreal v. Brown Express, Inc.*, 529 F.2d 1219, 1221 (5th Cir. 1976); *Twitchell*, *supra* note 46, at 830 n.95. If the plaintiff's motive is relevant to the artful pleading inquiry, such motive is a factual question for the district court to resolve, and the district court's finding is entitled to deference on appeal. *See* FED. R. CIV. P. 52(a). Examining the true nature of the plaintiff's claims rather than the plaintiff's purpose, however, is the generally accepted basis of the artful pleading inquiry. *See Twitchell*, *supra* note 46, at 836; *Levy*, *supra* note 92, at 661; *Rona L. Pietrzak*, Note, *Federated Department Stores v. Moitie: A Radical Departure from Traditional Removal Jurisdiction or an Aberration?*, 43 U. PITT. L. REV. 1165, 1177 (1982).

was not thought to be preempted by federal antitrust law in 1981.¹⁸⁴ Nor did federal law provide the only potential basis for relief.¹⁸⁵ California provided remedies for antitrust violations,¹⁸⁶ and there is no hint in the Court's opinion that the state law allegations in *Brown II* failed to state claims under California law. Therefore, *Federated Department Stores* was not an application of preexisting artful pleading law.¹⁸⁷

Federated Department Stores also violates well-established jurisdictional principles. *Brown* should have been entitled to ignore available federal claims and seek relief exclusively under state law. If not, *Federated Department Stores* contradicts the master-of-the-complaint rule. Although federal law may have been relevant to a res judicata defense,¹⁸⁸ removal is not usually allowed on the basis of a federal defense. If a federal res judicata defense justified removal, *Federated Department Stores* contradicts the well-pleaded complaint rule.

Nor can *Federated Department Stores* be dismissed on the ground that the footnote discussing jurisdiction was simply an ill-considered statement by the Court that was not meant to upset settled law.¹⁸⁹ The jurisdictional statement was necessary to the holding because the Court could not have reversed the Ninth Circuit on the merits of the res judicata issue without it. Moreover, the Court issued the footnote over a vigorous dissent by Justice Brennan that identified the seeming flaws in

184. See *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 130 (1978). The Supreme Court recently confirmed that federal antitrust law does not preempt state laws on the same subject. See *California v. ARC Am. Corp.*, 490 U.S. 93, 109 (1989).

185. See *supra* note 45 (noting that the artful pleading doctrine is potentially applicable whenever federal law provides the only possible basis for recovery).

186. See CAL. BUS. & PROF. CODE §§ 16720, 16726 (West 1964).

187. Although *Federated Department Stores* seems a surprising departure from established law, the Fifth Circuit anticipated *Federated Department Stores*, as well as the Ninth Circuit's interpretation of it. See *infra* text accompanying notes 210-221. In *Villarreal v. Brown Express, Inc.*, the court allowed removal on the ground that state claims pled in state court were merged into a prior federal judgment. 529 F.2d 1219, 1221 (5th Cir. 1976).

188. Federal law governs the res judicata effect of a federal court judgment in a federal question case on a subsequent lawsuit in state court. See *Limbach v. Hooven & Allison Co.*, 466 U.S. 353, 361-62 (1984); *Stoll v. Gottlieb*, 305 U.S. 165, 170-71 (1938); *Deposit Bank v. Frankfort*, 191 U.S. 499, 514-18 (1903); *Sullivan v. First Affiliated Sec., Inc.*, 813 F.2d 1368, 1376 (9th Cir.), *cert. denied*, 484 U.S. 850 (1987); *Travelers Indem. Co. v. Sarkisian*, 794 F.2d 754, 761 n.8 (2d Cir.), *cert. denied*, 479 U.S. 885 (1986); RESTATEMENT (SECOND) OF JUDGMENTS § 87 (1980); 18 WRIGHT ET AL., *supra* note 9, § 4468, at 651-52 (2d ed. 1981).

189. But see *Blumenfeld*, *supra* note 64, at 365 (arguing that *Federated Department Stores* "should be read solely as a res judicata decision"); *Pietrzak*, *supra* note 183, at 1177 (arguing that after *Federated Department Stores* removal should continue to be available "in conformity with traditional removal principles, only if a plaintiff's claim required construction of federal law").

the Court's jurisdictional analysis.¹⁹⁰ The only conclusion is that the Court said what it meant and meant what it said.¹⁹¹

B. The Lower Courts Apply *Federated Department Stores*

Because *Federated Department Stores* did not give a rationale for its jurisdictional holding, it fell to the lower courts to supply one. The Second and Ninth Circuits have taken the lead in attempting to discern the basis for the Court's jurisdictional ruling. As discussed below, neither Circuit's view proves to be satisfactory.

(1) *The Election of Remedies View*

In *Travelers Indemnity Co. v. Sarkisian*,¹⁹² the Second Circuit held that *Federated Department Stores* allows removal whenever the plaintiff files a complaint based on federal law in federal court and subsequently files state claims with essentially the same elements in state court.¹⁹³ The court viewed *Federated Department Stores* as a variant, rather than a contradiction, of the master-of-the-complaint rule. In the Second Circuit's view, Brown had initially elected to proceed in federal court based on federal antitrust law. At the initial stage, he was free to characterize his claims however he wished. Having done so, he was not later free to recharacterize his claims under state law in an attempt to avoid the res judicata effect of a federal judgment.¹⁹⁴ The Second Circuit's rule allows a plaintiff only one bite at the characterization apple.¹⁹⁵

190. See *Federated Dep't Stores*, 452 U.S. at 406-10 (Brennan, J., dissenting).

191. It should, however, be noted that just two years after *Federated Department Stores*, the *Franchise Tax Board* Court surveyed the law of federal question jurisdiction and artful pleading without mentioning *Federated Department Stores*. See *Franchise Tax Bd. v. Construction Laborers Vacation Trust*, 463 U.S. 1, 7-12, 22-24 (1983); *Magic Chef, Inc. v. International Molders Union*, 581 F. Supp. 772, 776 n.4 (E.D. Tenn. 1983) (arguing that "*Franchise Tax Board* supersedes [*Federated Department Stores*]").

192. 794 F.2d 754 (2d Cir.), cert. denied, 479 U.S. 885 (1986).

193. *Id.* at 760.

194. *Id.* at 760-61.

195. A number of lower courts adopted the election of remedies view prior to *Travelers*. See *Powers v. South Cent. United Food & Commercial Workers Unions & Employers Health & Welfare Trust*, 719 F.2d 760, 766 (5th Cir. 1983) (denying removal because the plaintiff "ha[d] not evidenced a desire to proceed under federal law" by filing a prior federal complaint); *Reid v. Walsh*, 620 F. Supp. 930, 934 (M.D. La. 1985) (allowing removal of state claims because the plaintiff filed federal claims on the same day containing "the same general allegations and factual descriptions"); *Salveson v. Western States Bankcard Ass'n*, 525 F. Supp. 566, 577 (N.D. Cal. 1981) (noting that *Federated Department Stores* allows removal "only when the plaintiff by his own conduct, either by filing originally in federal court or by acceding to federal jurisdiction after removal, has made his claim a federal one"), *aff'd in part and rev'd in part*, 731 F.2d 1423 (9th Cir. 1984).

The Second Circuit's view has certain attractive qualities. *Travelers* pays obeisance to the master-of-the-complaint rule, although restricting it somewhat, and is consistent with the well-pleaded complaint rule.¹⁹⁶ In this regard, it is faithful to the spirit of *Avco*. At least under the replacement preemption model, *Avco* may also be viewed as an exception to the master-of-the-complaint rule.¹⁹⁷ *Travelers* is also consistent with other cases in which the plaintiff's actions, rather than the allegations of his complaint, establish his consent, whether real or fictional, to proceed under federal law.¹⁹⁸

The Second Circuit's analysis also has problematic aspects. The court's attempt to explain *Federated Department Stores* on some basis other than the res judicata impact of the prior federal judgment is not wholly successful. In *Travelers*, the Second Circuit held that the complaint was not removable because the claims filed in the second action did not have substantially the same elements as the prior federal claims.¹⁹⁹ If the state claims had been sufficiently similar, however, the court would have had to inquire whether those claims were the same as the prior federal claims for removal purposes.²⁰⁰

Had it been forced to make this inquiry, the Second Circuit presumably would have required that the second-filed state claims have the same factual basis as the prior federal claims. In a wide variety of contexts,

196. *Travelers Indem. Co. v. Sarkisian*, 794 F.2d 754, 761 n.8 (2d Cir.), *cert. denied*, 479 U.S. 885 (1986).

197. See *supra* text accompanying notes 45-49.

198. See *Salveson*, 525 F. Supp. at 576-77. It is, of course, well settled that the parties cannot establish federal jurisdiction by consent and that the right to challenge jurisdiction is never waived. See *American Fire & Casualty Co. v. Finn*, 341 U.S. 6, 17-18 (1951); *Capron v. Van Noorden*, 6 U.S. (2 Cranch) 126, 127 (1804). However, a number of courts have allowed removal of claims that were ambiguous as to whether state or federal law governed relief when the plaintiff did not object to removal in a timely fashion. See *Charles D. Bonanno Linen Serv. v. McCarthy*, 708 F.2d 1, 3-6 (1st Cir.), *cert. denied*, 464 U.S. 936 (1983); *Vitarroz Corp. v. Borden, Inc.*, 644 F.2d 960, 963-65 (2d Cir. 1981); *Stone v. Stone*, 632 F.2d 740, 742-43 (9th Cir. 1980), *cert. denied*, 453 U.S. 922 (1981); *In re Carter*, 618 F.2d 1093, 1100-03 (5th Cir. 1980), *cert. denied*, 450 U.S. 949 (1981). Although the plaintiff is the master of his claim, he may be deemed to assert his potential federal claim when he does not object to removal. Although the plaintiff may not consent to jurisdiction, he may consent to have his claims viewed as federal. See *Vitarroz Corp.*, 644 F.2d at 964. Similarly, if the plaintiff does not object to removal, the case proceeds to judgment on the merits in the trial court, and the plaintiff attacks subject matter jurisdiction on appeal, the issue on appeal is whether the district court would have had original jurisdiction, not whether the district court properly exercised removal jurisdiction. See *Grubbs v. General Elec. Credit Corp.*, 405 U.S. 699, 702 (1972).

199. *Travelers*, 794 F.2d at 761.

200. See *Reid v. Walsh*, 620 F. Supp. 930, 934 (M.D. La. 1985) (allowing removal of state claims that contained "the same general allegations and factual descriptions" contained in federal claims filed on the same day).

whether claims have a sufficiently similar factual basis to be treated together is determined by whether they arise out of the same transaction or occurrence.²⁰¹ Presumably the Second Circuit would have applied the same transaction test to determine whether the second-filed state claims involved a reassertion of the prior federal claims. This inquiry is identical to the *res judicata* inquiry because the same transaction test is also used to determine the scope of a claim for preclusion purposes.²⁰²

When the first-filed federal action has proceeded to judgment, as in *Travelers*, the Second Circuit's rule avoids the *res judicata* inquiry in cases in which the second-filed state claims do not have substantially the same elements as the prior federal claims.²⁰³ Under the Second Circuit's rule, similarity of elements is a necessary but not sufficient condition for removal. Thus, taking the Second Circuit's view, removal in *Federated Department Stores* is premised not only on the fact that the second-filed state claims had substantially similar elements as the prior federal claims, but also on the fact that they arose out of the same transaction.²⁰⁴

The Second Circuit's test is also problematic because it is difficult to apply. The test turns on whether the claims in a second state lawsuit are

201. See FED. R. CIV. P. 13(a) (stating that counterclaims are compulsory if they "arise[] out of the [same] transaction or occurrence" as the plaintiff's claim); FED. R. CIV. P. 15(c)(2) (stating that amendments relate back to an original pleading whenever the amended pleading "arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading"); FED. R. CIV. P. 20(a) (permitting joinder of claims against different parties if they arise "out of the same transaction, occurrence, series of transactions or occurrences"); *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 371 n.10 (1978) (assuming that ancillary jurisdiction attaches to claims that arise out of a "common nucleus of operative fact"); *United Mine Workers v. Gibbs*, 383 U.S. 715, 725 (1966) (holding that pendent jurisdiction attaches to claims that "derive from a common nucleus of operative fact").

202. See, e.g., *Keith v. Aldridge*, 900 F.2d 736, 740 (4th Cir.), *cert. denied*, 111 S. Ct. 257 (1990); *Lane v. Peterson*, 899 F.2d 737, 742-44 (8th Cir.), *cert. denied*, 111 S. Ct. 74 (1990); *Lowell Staats Mining Co. v. Philadelphia Elec. Co.*, 878 F.2d 1271, 1274 (10th Cir. 1989).

203. The Second Circuit's test seemingly allows recharacterization of second-filed state claims when parallel federal claims have not proceeded to judgment. *Res judicata* does not apply to these cases. See RESTATEMENT (SECOND) OF JUDGMENTS § 19 (1980). This aspect of the Second Circuit's test is questionable. See *Sullivan v. First Affiliated Sec., Inc.*, 813 F.2d 1368, 1375 (9th Cir.), *cert. denied*, 484 U.S. 850 (1987). In addition to lacking *res judicata* impact, a prior-filed federal case that has not proceeded to judgment normally does not provide grounds to enjoin a subsequent state in personam action. See, e.g., *Atlantic Coast Line R.R. v. Brotherhood of Locomotive Eng'rs*, 398 U.S. 281, 295-96 (1970); *Carter v. Ogden Corp.*, 524 F.2d 74, 76 (5th Cir. 1975). Thus, the federal case usually must proceed to judgment first in order to have an impact on the state case. If the federal interest in protecting a first-in-time federal case is not sufficient to justify federal intervention in state proceedings, and if the state court is free to decide its case without regard to the pendency of federal proceedings, it is hard to understand why there is a sufficient federal interest in preventing dual litigation to justify recharacterizing the claims in the state lawsuit as federal claims.

204. See *Federated Dep't Stores*, 452 U.S. at 396 (noting that the second-filed state claims were based on the same allegations as the prior federal action).

"substantially" similar to the claims in a prior federal lawsuit. Because substantiality is always in the eye of the beholder, this test is inherently unpredictable.²⁰⁵ Although it was easy for the *Travelers* court to apply the substantial similarity test in the case before it,²⁰⁶ other cases promise to be more difficult. Further, the *Travelers* court did not provide any guidelines for the application of this test. The court's only explanation for why the elements of the federal antitrust claim in *Brown I* and the state antitrust claim in *Brown II* were "substantially" the same was that California antitrust law was generally the same as federal law.²⁰⁷

Finally, the *Travelers* decision is questionable in that it is somewhat unfaithful to *Federated Department Stores*. Admittedly, *Federated Department Stores* focused only on the disposition of *Brown II*, and the *Travelers* decision did supply a justification for the jurisdictional holding in *Brown II*. The lower courts, however, whose holdings the Supreme Court endorsed, had also accepted jurisdiction over *Moitie II*.²⁰⁸ Unlike *Brown*, *Moitie* filed his first complaint in state court based on state law and had it removed.²⁰⁹ Under the Second Circuit's modified master-of-the-complaint rationale, *Moitie II* would have been remanded because *Moitie* had never elected to proceed in federal court under federal law. This result is inconsistent with the Supreme Court's whole-hearted acceptance of the lower courts' jurisdictional rulings.

(2) *The Res Judicata View*

In *Sullivan v. First Affiliated Securities, Inc.*,²¹⁰ the Ninth Circuit took a different approach in applying *Federated Department Stores*. The Ninth Circuit held that *Federated Department Stores* permits removal of state claims that are barred by the res judicata effect of a prior federal judgment.²¹¹ In contrast to the Second Circuit's attempt to be faithful to

205. See *Sullivan*, 813 F.2d at 1375 (arguing that "attempts to place limits on the scope of the election rationale have been unsatisfactory").

206. See *Travelers*, 794 F.2d at 761 (holding that state claims for fraudulent conveyance, piercing the corporate veil, unlawful payment of dividends, and unlawful salary payments were not substantially similar to claims asserted under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-1966 (1982 & Supp. III 1985), because the existence of a pattern of racketeering activity and the operation of an enterprise were elements of the federal but not the state claims).

207. See *Travelers*, 794 F.2d at 760.

208. See *Federated Dep't Stores*, 452 U.S. at 397 n.2.

209. *Id.* at 395-96.

210. 813 F.2d 1368 (9th Cir. 1987).

211. *Id.* at 1375-76. Whether state claims are barred by the res judicata effect of a federal court's judgment in a prior federal question case is a difficult question. In order to be barred, state claims have to arise out of the same transaction or occurrence as the prior federal claims, which is the general federal test for res judicata. See *supra* text accompanying note 202.

the notion that the artful pleading doctrine is consistent with the well-pleaded complaint rule,²¹² the Ninth Circuit recognized that removal based on federal preemption always involves removal based on a federal defense.²¹³ Because the artful pleading doctrine is already inconsistent with the well-pleaded complaint rule, the Ninth Circuit viewed *Federated Department Stores* as an extension of the same principle.²¹⁴

The Ninth Circuit's analysis of the nature of preemption under the artful pleading doctrine is accurate. Even the replacement preemption model, which comes closest to reconciling the artful pleading doctrine with traditional jurisdictional law, allows removal based on a federal defense.²¹⁵ The Supreme Court has never acknowledged, however, that the artful pleading doctrine is inconsistent with the well-pleaded complaint rule.²¹⁶ Therefore, the Ninth Circuit's attempt to create a second exception to the well-pleaded complaint rule does not seem well founded. To view the *Federated Department Stores* Court as requiring otherwise

Claims that a plaintiff did not have the power to bring in the prior suit, however, are not barred by res judicata. See *supra* note 57. State claims arising out of the same transaction or occurrence as federal claims will be within the pendent jurisdiction of the federal court in the initial case. See *United Mine Workers v. Gibbs*, 383 U.S. 715, 725 (1966). The federal court's exercise of jurisdiction over these claims is discretionary. See *id.* at 726-27. As a consequence, the application of res judicata to pendent state claims depends upon the second court's prediction of whether the first court would have exercised its discretion to hear the pendent state claims. See RESTATEMENT (SECOND) OF JUDGMENTS § 25 cmt. e (1980) (suggesting that the pendent state claims should be barred in a second suit unless the federal court "would clearly have declined to exercise . . . [its] discretion" over them). In *Federated Department Stores, Brown I* was dismissed at the threshold for lack of standing. The district court probably would not have exercised its discretion to hear the pendent state claims. See *Gibbs*, 383 U.S. at 726. As a consequence, the majority in *Federated Department Stores* suggested that only claims federalized by the artful pleading doctrine were barred by the application of res judicata. See *Federated Dep't Stores*, 452 U.S. at 402; see also Mark Jay Altschuler, Note, *The Res Judicata Implications of Pendent Jurisdiction*, 66 CORNELL L. REV. 608, 622-24 (1981) (arguing that res judicata does not apply to potential pendent claims when the federal claims in the first case were dismissed for failure to state a claim).

212. See *Travelers*, 794 F.2d at 758, 761 n.8.

213. See *Sullivan*, 813 F.2d at 1372 n.5.

214. See *id.* at 1376. A number of other courts have adopted *Sullivan*. See *Hartley v. Mentor Corp.*, 869 F.2d 1469, 1471 n.2 (Fed. Cir. 1989) (allowing removal based on the collateral estoppel effect of a prior federal judgment); *Pointer v. Crown Cork & Seal Co.*, 791 F. Supp. 164, 167-68 (S.D. Tex. 1992); *King Provision Corp. v. Burger King Corp.*, 750 F. Supp. 501, 505 (M.D. Fla. 1990); *Nowling v. Aero Servs. Int'l*, 734 F. Supp. 733, 737 (E.D. La. 1990); see also *Maierhofer v. Crown Realty Co.*, No. CIV.A.89-F-330, 1989 U.S. Dist. LEXIS 18184, at *1-13 (D. Colo. Apr. 11, 1989) (denying removal of state securities claims filed simultaneously with federal securities claims).

215. See *supra* text accompanying notes 50-52.

216. The artful pleading doctrine is usually described as a "corollary" of the well-pleaded complaint rule. See, e.g., *Caterpillar*, 482 U.S. at 393; *Taylor*, 481 U.S. at 63; *Franchise Tax Bd.*, 463 U.S. at 22.

means reading a great deal into the Court's cryptic footnote on jurisdiction.

The Ninth Circuit's analysis of *Federated Department Stores* is also objectionable because it requires a federal court to decide the res judicata defense on the merits to determine whether jurisdiction exists.²¹⁷ The *Sullivan* test leads to anomalous results whether or not the district court ultimately holds that it has jurisdiction. If the district court decides it has jurisdiction, the complaint is not only removable but also barred by res judicata in the same instant.²¹⁸ *Sullivan* allows removal only if the federal defense will be successful.²¹⁹ If the district court decides it does not have jurisdiction, its ruling on the merits of the res judicata issue is not binding on the state court on remand. The defendant will have a second opportunity to assert his federal res judicata defense, resulting in a substantial waste of judicial resources.²²⁰

Finally, *Sullivan*, like *Travelers*, is somewhat inconsistent with *Federated Department Stores*. The Supreme Court in *Federated Department Stores* did not connect the removal issue with the res judicata issue. It held that jurisdiction existed prior to examining the merits of the res judicata issue.²²¹ Therefore, it would seem that the existence of jurisdiction in *Federated Department Stores* depended on some other ground.

217. Cf. *Travelers*, 794 F.2d at 761 n.10 (noting that the scope of a claim for jurisdictional purposes is not the same for artful pleading purposes as it is for res judicata purposes).

218. See *Williams*, *supra* note 51, at 1006.

219. Before deciding the claims were not removable, the *Sullivan* court thought it necessary to note that the claims in the state lawsuit were not "barred by res judicata." *Sullivan*, 813 F.2d at 1376. The claims in *Sullivan* were not barred by res judicata because the prior federal case had not proceeded to judgment. *Id.* at 1370. The courts following *Sullivan* have required that removal be conditioned on the plaintiff's state claims actually being barred by res judicata. Compare *Redwood Theaters, Inc. v. Festival Enters.*, 908 F.2d 477, 480-81 (9th Cir. 1990) (refusing to allow removal of state antitrust claims that were not preempted by federal law in the absence of res judicata) and *Her Majesty the Queen v. City of Detroit*, 874 F.2d 332, 342 (6th Cir. 1989) (denying removal and noting that *Federated Department Stores* "applies only to the removal of state claims barred by a prior federal judgment") and *California v. Chevron Corp.*, 872 F.2d 1410, 1416 (9th Cir. 1989) (denying removal when the judgments in first-filed federal actions were reversed on appeal) and *Pointer v. Crown Cork & Seal Co.*, 791 F. Supp. 164, 167 (S.D. Tex. 1992) (denying removal when a prior federal case had not proceeded to judgment) with *Nowling v. Aero Servs. Int'l*, 734 F. Supp. 733, 737 (E.D. La. 1990) (allowing removal of a state case that was "no more than an attempt to collaterally attack" a prior federal case).

220. See *infra* note 318 and accompanying text.

221. *Federated Dep't Stores*, 452 U.S. at 397 n.2.

(3) *The Res Judicata View Applied to Diversity Cases*

The res judicata view of *Federated Department Stores* reached its apogee in *Ryan v. Dow Chemical Co.*²²² Prior to *Ryan*, plaintiffs claiming that they had been harmed by their exposure to Agent Orange brought numerous federal class actions based on diversity of citizenship. These cases were settled in 1984.²²³ One group of plaintiffs in *Ryan*, composed of individuals covered by the Agent Orange settlement, filed state tort claims in state court that were identical to the claims in the Agent Orange class actions.²²⁴ These claims were brought against nondiverse defendants who were also defendants in the Agent Orange litigation.²²⁵ The defendants removed the case, relying in part on an artful pleading theory.²²⁶ Judge Weinstein, of the United States District Court for the Eastern District of New York, interpreted *Travelers* as holding that removal is proper whenever a plaintiff files claims in a federal lawsuit and files "virtually identical" claims in a subsequent state lawsuit.²²⁷ Since the tort claims in *Ryan* were identical to the tort claims asserted in the Agent Orange litigation, Judge Weinstein held that the federal court had jurisdiction.²²⁸

Ryan is arguably a fair extension of the Ninth Circuit's decision in *Sullivan*. If removal can be used to prevent plaintiffs from filing state court litigation in order to avoid the res judicata impact of a previous federal judgment, it may be irrelevant whether jurisdiction in the federal case was based on federal question or diversity jurisdiction.²²⁹ Yet, the *Ryan* court ignored the fact that the federal interest in enforcing a diversity judgment is not as significant as the federal interest in enforcing a federal question judgment. For example, although it is clear that federal law governs the res judicata effect of a federal judgment in a federal question case,²³⁰ whether federal or state law governs the res judicata effect of a federal diversity judgment is disputed.²³¹ Given the diminished federal

222. 781 F. Supp. 902 (E.D.N.Y.), *reh'g granted in part*, No. 79 Civ. 747, 1991 WL 24331 (E.D.N.Y. Nov. 12, 1991).

223. *Id.* at 908-11.

224. *Id.* at 911-14.

225. *Id.*

226. *See id.* at 913.

227. *Id.* at 917 (quoting *Travelers*, 794 F.2d at 760).

228. *Id.* at 916-18; *see also* *Hornsby v. Hornsby's Stores, Inc.*, No. 90-C-06105, 1991 U.S. Dist. LEXIS 2926, at *5 (N.D. Ill. Mar. 12, 1991) (allowing removal based upon the res judicata impact of a prior federal judgment founded on state law).

229. *Ryan v. Dow Chemical Co.*, 781 F. Supp. 902 (E.D.N.Y.), *reh'g granted in part*, No. 79 Civ. 747, 1991 WL 24331 (E.D.N.Y. Nov. 12, 1991).

230. *See supra* note 188.

231. *See* *Gelb v. Royal Globe Ins. Co.*, 798 F.2d 38, 42 n.3 (2d Cir. 1986) (collecting cases

interest in enforcing federal diversity judgments, it seems inappropriate to extend *Federated Department Stores*, a questionable case at best, to the diversity context. The Ninth Circuit itself has held that *Federated Department Stores* does not permit removal based on the res judicata impact of a federal case adjudicating state law issues.²³²

Ryan, moreover, was decided by a district court in the Second Circuit that was required to follow *Travelers* rather than *Sullivan*. *Travelers* rejected the view that the existence of a federal res judicata defense allows removal under the artful pleading doctrine.²³³ *Travelers* was based on the notion that a federal claim, once asserted, remains federal for all time.²³⁴ Diversity, once established, does not exist permanently. By its very nature, diversity of citizenship is dependent on the parties involved in a particular case. The plaintiff's artful pleading cannot have any effect on the existence of diversity.

One can easily understand Judge Weinstein's desire to extend federal protection to the settlement in the Agent Orange litigation, which settled claims in over 600 cases involving approximately 15,000 plaintiffs, took six years to conclude, and will not be finally disposed of until 1994.²³⁵ Judge Weinstein did have the right to enjoin the state court litigation in *Ryan*, consistent with the Anti-Injunction Act, "in aid of [his] jurisdiction" in the Agent Orange litigation or "to protect or effectuate [the] judgment[]" in the Agent Orange litigation.²³⁶ It may seem

regarding the res judicata effect of a federal diversity judgment), *cert. denied*, 480 U.S. 948 (1987); see also RESTATEMENT (SECOND) OF JUDGMENTS § 87 cmt. b (1982) (taking the view that federal law should govern the preclusive effect of a federal diversity judgment). Compare Stephen B. Burbank, *Interjurisdictional Preclusion, Full Faith and Credit and Federal Common Law: A General Approach*, 71 CORNELL L. REV. 733, 778-97 (1986) (arguing that state law should govern the preclusive effect of a federal diversity judgment) with Ronan E. Degnan, *Federalized Res Judicata*, 85 YALE L.J. 741, 755-73 (1976) (arguing that federal law should govern the preclusive effect of a federal diversity judgment). If state law governs the res judicata issue, removal is clearly improper in a case between nondiverse parties because there is no federal question in the case.

232. See *Ultramar Am., Ltd. v. Dwell*, 900 F.2d 1412, 1414-17 (9th Cir. 1990).

233. See 794 F.2d at 761 n.8.

234. See *supra* text accompanying notes 193-195.

235. See *Ryan*, 781 F. Supp. at 907-08, 914.

236. 28 U.S.C. § 2283 (1988). The Anti-Injunction Act permits federal judges to enjoin state court proceedings that would interfere with the disposition of federal class actions, see, e.g., *Battle v. Liberty Nat'l Life Ins. Co.*, 877 F.2d 877, 880-83 (11th Cir. 1989); *In re Baldwin-United Corp.*, 770 F.2d 328, 337 (2d Cir. 1985), or involve an attempt to relitigate matters decided by a federal court in a prior proceeding, see, e.g., *Amalgamated Sugar Co. v. NL Indus.*, 825 F.2d 634, 639 (2d Cir.), *cert. denied*, 484 U.S. 992 (1987); *Silcox v. United Trucking Serv.*, 687 F.2d 848, 850-51 (6th Cir. 1982). See generally 17 WRIGHT ET AL., *supra* note 9, §§ 4225-26 (2d ed. 1988 & Supp. 1992) (discussing Anti-Injunction Act). Judge Weinstein's decision to entertain jurisdiction in *Ryan* was on the alternative ground that he had continuing jurisdiction over the settlement in the Agent Orange litigation. See *Ryan*, 781 F. Supp. at 915-

irrelevant whether Judge Weinstein protected the Agent Orange settlement by ensuring that res judicata barred the state claims in *Ryan*²³⁷ or by enjoining the state litigation.

There is, however, a difference. Allowing removal based on the res judicata impact of a federal judgment gives the defendant an absolute right to a federal forum in subsequent litigation. The Anti-Injunction Act merely allows federal judges to exercise their discretion in enjoining state court relitigation.²³⁸ Protecting the prior federal judgment through removal, rather than requiring an application for an injunction, eliminates the district judge's discretion to deny an injunction based on general equitable principles or respect for the state courts' ability to apply res judicata correctly.²³⁹ Therefore, recourse to the federal courts' equitable powers, rather than removal, better protects federal judgments against state court evasion.²⁴⁰

16. It is well accepted that no independent basis of jurisdiction is required to issue an injunction protecting a prior judgment. *See, e.g.,* Local Loan Co. v. Hunt, 292 U.S. 234, 239 (1934); Southwest Airlines Co. v. Texas Int'l Airlines, 546 F.2d 84, 89-90 (5th Cir.), *cert. denied*, 434 U.S. 832 (1977).

237. In *Ryan*, the application of res judicata to the claims of the unnamed class members in the Agent Orange litigation depended on whether the Agent Orange class actions comported with constitutional due process requirements, *see, e.g.,* Hansberry v. Lee, 311 U.S. 32, 42-43 (1940), and the requirements of Federal Rule of Civil Procedure 23. The Second Circuit's rulings on the appeals from the Agent Orange litigation appear to establish that these requirements were met. *See Ryan*, 781 F. Supp. at 909.

238. *See* Chick Kam Choo v. Exxon Corp., 486 U.S. 140, 151 (1988) (noting that "the fact that an injunction *may* issue under the Anti-Injunction Act does not mean that it *must* issue"). The federal courts have often refused to enjoin subsequent state litigation despite the potential preclusive impact of a prior federal judgment. *See, e.g.,* Staffer v. Bouchard Transp. Co., 878 F.2d 638, 644 (2d Cir. 1989) (finding no abuse of discretion in a district court's denial of an injunction); Kerr-McGee Chem. Corp. v. Hartigan, 816 F.2d 1177, 1181-82 (7th Cir. 1987) (noting that the district court had discretion to refuse to enjoin state court proceedings because the res judicata defense could be raised in state court); Lamb Enters. v. Kiroff, 549 F.2d 1052, 1060-61 (6th Cir.) (reversing the grant of an injunction because the ability to raise the res judicata defense in state court constituted an adequate remedy at law), *cert. denied*, 431 U.S. 968 (1977).

239. *See* Mitchum v. Foster, 407 U.S. 225, 243 (1972) (noting that the fact that a case falls outside the prohibitory scope of the Anti-Injunction Act does not "qualify in any way the principles of equity, comity, and federalism that must restrain a federal court when asked to enjoin a state court proceeding"); Brown v. McCormick, 608 F.2d 410, 415-16 (10th Cir. 1979) (noting that those seeking to enjoin state court proceedings must satisfy the general equitable requirements for the issuance of injunctions); Allan D. Vestal, *Protecting a Federal Court Judgment*, 42 TENN. L. REV. 635, 661-71 (1975); Comment, *Anti-Suit Injunctions Between State and Federal Courts*, 32 U. CHI. L. REV. 471, 485-86 (1965).

240. *See* C. Douglas Floyd, *Control of Break-Away State Antitrust Litigation: An Issue of Federalism*, 35 HASTINGS L.J. 1, 30-39 (1983).

C. Conclusion

In conclusion, the Supreme Court's expansion of the artful pleading doctrine in *Federated Department Stores* was mistaken and the Court should retract this portion of its decision at its earliest opportunity.²⁴¹ The lower courts' attempts to justify the result in *Federated Department Stores* are unsatisfactory and further demonstrate that *Federated Department Stores* was erroneously decided. Indeed, much of the conflict between the *Travelers* and *Sullivan* opinions can be attributed to both courts' attempts to give the narrowest possible application to *Federated Department Stores*.²⁴² Each court applied a test that precluded removal on the facts before it. Removal might have been proper in *Travelers* had the Second Circuit applied the Ninth Circuit's rule,²⁴³ and removal would have been proper in *Sullivan* had the Ninth Circuit applied the Second Circuit's rule.²⁴⁴

V. The Legitimacy of the Well-Pleaded Complaint Rule

Although both the *Avco* and *Federated Department Stores* branches of the artful pleading doctrine might be seen as modifications of the master-of-the-complaint rule rather than as contradictions of the well-pleaded complaint rule, at their cores both branches allow removal based on a federal defense.²⁴⁵ *Avco* allows removal based on the defense of federal preemption.²⁴⁶ The res judicata effect of a prior federal judgment is central to *Federated Department Stores*.²⁴⁷

The justifications for the well-pleaded complaint rule must therefore be examined. Because the Constitution authorizes the federal courts to

241. See *id.* at 50-51; Williams, *supra* note 51, at 997-1007.

242. See *Sullivan*, 813 F.2d at 1375 (attempting to provide "a less expansive explanation" for *Federated Department Stores* than *Travelers*); *Travelers*, 794 F.2d at 761 n.10 (recognizing that the "holding has the effect of defining a 'claim' more narrowly for artful pleading purposes than for preclusion purposes"); see also Twitchell, *supra* note 46, at 830 n.95 (noting that "courts and commentators alike have suggested that [*Federated Department Stores*] should be read as restrictively as possible").

243. The state claims upon which the defendants sought removal in *Travelers* arose out of the same transaction as the prior federal claims that had been dismissed on the merits. See *Travelers*, 794 F.2d at 756-57. Therefore, the state claims would have been barred by res judicata if the court hearing the subsequent claims could predict that the first court would have exercised its pendent jurisdiction to hear the state claims. See *supra* note 211.

244. The state securities claims in *Sullivan* had substantially the same elements and arose out of the same transaction as the federal securities claims that were filed before any summons was served in the state action. See *Sullivan*, 813 F.2d at 1370. The state claims would have been removable under the Second Circuit's theory.

245. See *infra* note 317.

246. See *supra* text accompanying notes 50-52, 94-96.

247. See *supra* text accompanying notes 199-204, 211-214.

exercise federal question jurisdiction whenever a case contains any federal ingredient,²⁴⁸ Congress has the power to modify the well-pleaded complaint rule. The only issue is whether Congress should act to change the rule or the courts should act to eliminate the rule by relying on Congress's existing jurisdictional pronouncements. A number of cases,²⁴⁹ as well as a body of academic literature,²⁵⁰ have criticized the well-pleaded complaint rule. The American Law Institute has proposed that the federal courts should have removal jurisdiction over any suit involving a substantial federal issue, whether that issue is introduced by the plaintiff or the defendant.²⁵¹ The following section examines the wisdom of the well-pleaded complaint rule and concludes that the rule is desirable.

A. The Well-Pleaded Complaint Rule from a Global Perspective

(1) *Jurisdiction from the Outset of the Case*

The well-pleaded complaint rule may be justified initially on the theory that a federal court must have jurisdiction at the beginning of a case.²⁵² This rationale is relevant only in the context of original jurisdiction. If the defendant were allowed to remove the case based upon his assertion of a federal defense, the federal court would automatically have jurisdiction upon the case's inception in federal court. However, Congress, in its wisdom, has conditioned removal on the plaintiff's ability to

248. See *supra* text accompanying note 5.

249. See, e.g., *Franchise Tax Bd. v. Construction Laborers Vacation Trust*, 463 U.S. 1, 4 (1983) (noting that the rule "involv[es] perhaps more history than logic"); *Sullivan v. First Affiliated Sec., Inc.*, 813 F.2d 1368, 1372 n.4 (9th Cir.) (noting that the Ninth Circuit has "questioned the logic of denying removal jurisdiction to a defendant who raises a federal defense"), *cert. denied*, 484 U.S. 850 (1987).

250. See, e.g., James H. Chadbourn & A. Leo Levin, *Original Jurisdiction of Federal Questions*, 90 U. PA. L. REV. 639, 665 (1942); William Cohen, *The Broken Compass: The Requirement That a Case Arise "Directly" Under Federal Law*, 115 U. PA. L. REV. 890, 894 (1967); David P. Currie, *The Federal Courts and the American Law Institute* (pt. 2), 36 U. CHI. L. REV. 268, 269-70 (1969); Donald L. Doernberg, *There's No Reason For It; It's Just Our Policy: Why the Well-Pleaded Complaint Rule Sabotages the Purposes of Federal Question Jurisdiction*, 38 HASTINGS L.J. 597, 646-62 (1987); Paul J. Mishkin, *The Federal "Question" in the District Courts*, 53 COLUM. L. REV. 157, 164 (1953); Herman L. Trautman, *Federal Right Jurisdiction and the Declaratory Remedy*, 7 VAND. L. REV. 445, 460-63 (1954).

251. AMERICAN LAW INSTITUTE, *STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS* § 1312(d) (1969) (permitting the exercise of removal jurisdiction if the defendant asserts a federal defense or counterclaim); see also *Sullivan*, 813 F.2d at 1372 n.4 (suggesting that defendants have the right to a federal forum to assert federal defenses).

252. See Robin E. Dieckmann, Note, *Federal Jurisdiction over Declaratory Judgment Suits—Federal Preemption of State Law*, 1986 U. ILL. L. REV. 127, 137.

obtain original jurisdiction.²⁵³ Thus, the defendant may remove a case to federal court only if the plaintiff could have commenced it there.

From the perspective of a plaintiff trying to file in federal court, it may seem that the court needs jurisdiction from the inception of the case to have the power to take any action.²⁵⁴ Although it may seem questionable whether a court whose jurisdiction has not been established has the power even to compel the defendant to file an answer,²⁵⁵ a federal court always has jurisdiction to determine whether it has jurisdiction.²⁵⁶ Thus, if a federal court's power to hear a case were to turn on the contents of the defendant's answer, the court would necessarily have the power to compel the filing of an answer and take any necessary action prior to the filing of an answer. The federal courts, therefore, do not need the well-pleaded complaint rule as an aid to establishing their jurisdiction.²⁵⁷

(2) *Avoiding the Anticipation of Defenses*

Practical considerations nevertheless make it advisable that a federal court have jurisdiction from the beginning of every case. The plaintiff should not be allowed to anticipate the defendant's defenses because he may anticipate them incorrectly and because, just as the plaintiff is master of his complaint, the defendant should be master of his answer.²⁵⁸ Therefore, if the well-pleaded complaint rule were eliminated in the context of original jurisdiction, it would be best to wait until the defendant actually files an answer before determining jurisdiction.²⁵⁹

There are potential drawbacks in predicating federal jurisdiction on the contents of the answer. If this rule were followed, the complaint might be in jurisdictional limbo for a substantial period of time.²⁶⁰ Although the Federal Rules of Civil Procedure require that the defend-

253. See 28 U.S.C. § 1441(a) (1988 & Supp. II 1990).

254. See Alan D. Hornstein, *Federalism, Judicial Power and the "Arising Under" Jurisdiction of the Federal Courts: A Hierarchical Analysis*, 56 IND. L.J. 563, 605 (1981).

255. See *id.* (arguing that a court lacking jurisdiction from the commencement of the case would not have the power to enter a default judgment).

256. See, e.g., *United States v. United Mine Workers*, 330 U.S. 258, 309-10 (1947).

257. See Doernberg, *supra* note 250, at 651-53.

258. See BATOR ET AL., *supra* note 9, at 997 (noting that the well-pleaded complaint rule "might be regarded as a technical rule of convenience, designed to avoid making original jurisdiction turn on speculation as to what issues will be decisive in the litigation").

259. From the perspective of removal jurisdiction, it is unnecessary for the plaintiff to anticipate defenses. At the time of removal, the defendant's federal defenses have already been asserted, and the existence of jurisdiction can be examined prior to doing any other business. As noted, however, Congress has generally conditioned removal jurisdiction on the existence of original jurisdiction. See *supra* text accompanying note 253.

260. See *Stone v. Stone*, 450 F. Supp. 919, 922 (N.D. Cal. 1978) (arguing in support of the well-pleaded complaint rule to avoid the "uncertainty and confusion" that would result from

ant answer the complaint within twenty days,²⁶¹ answers are seldom filed so quickly. The defendant's time to answer is often extended by stipulation. Moreover, the defendant's time to file an answer is tolled if he moves to dismiss the complaint,²⁶² and this motion may take an extended period of time to litigate.

The district judge has the power to alter the time period for the filing of an answer when the defendant files a motion to dismiss the complaint.²⁶³ Were we to abandon the well-pleaded complaint rule, district judges might require defendants to file immediate answers in those cases in which federal jurisdiction does not appear on the face of the complaint.²⁶⁴ Therefore, the well-pleaded complaint rule is not required to ensure that the district court is able to undertake the jurisdictional inquiry before embarking on other business.²⁶⁵

(3) *Federalism*

Because the procedural justifications for the well-pleaded complaint rule are not persuasive, the viability of this rule rests on federalism. The American Law Institute's view—that every federal issue deserves a federal forum—would be a practical disaster. It portends an explosion of cases subject to federal jurisdiction at a time when the federal courts are in danger of being overwhelmed by the volume of federal litigation.²⁶⁶

predicating jurisdiction on the defendant's answer), *aff'd* 632 F.2d 740 (9th Cir. 1980), *cert. denied*, 453 U.S. 922 (1981).

261. FED. R. CIV. P. 12(a).

262. *Id.*

263. *Id.*

264. The Eleventh Circuit seemed to approve a contrary procedure in *Lazuka v. FDIC*, 931 F.2d 1530 (11th Cir. 1991). In *Lazuka*, the Federal Deposit Insurance Corporation removed a case based on potential federal defenses, as it is permitted to do based on a specific statutory exception to the well-pleaded complaint rule. *Infra* note 301. Because the FDIC had filed a motion to dismiss the complaint, it had not filed an answer at the time the district court granted a motion to remand the case on jurisdictional grounds. *Lazuka*, 931 F.2d at 1538. Reviewing the remand order under a special provision of the banking laws, the Eleventh Circuit correctly held that the district court was not in a position to judge the existence of jurisdiction until an answer was filed. *See id.* The Eleventh Circuit also suggested, however, that the district court should decide the motion to dismiss before requiring the filing of an answer and determining jurisdiction. *See id.* at 1538 n.7. The Eleventh Circuit neglected to consider how the district court could rule on the merits of the case without first considering its jurisdiction or the potential waste of judicial resources if the district court denied the motion to dismiss and then was forced to remand the case.

265. *See Collins, supra* note 15, at 757.

266. *E.g.*, HENRY J. FRIENDLY, *FEDERAL JURISDICTION: A GENERAL VIEW* 124-27 (1973). Some have suggested that portions of the current federal question jurisdiction should be relegated to the state courts in order to reduce the burden on federal courts. *E.g.*, Jon O. Newman, *Restructuring Federal Jurisdiction: Proposals to Preserve the Federal Judicial System*, 56 U. CHI. L. REV. 761, 768-70 (1989). *But see Doernberg, supra* note 250, at 653-55.

As discussed below, the American Law Institute's view is also unsound as a matter of theory.²⁶⁷

a. The Center-of-Gravity View

The existence of a single federal defense should not determine whether the federal courts have jurisdiction. The federal courts' jurisdiction should extend to cases that are primarily concerned with federal law.²⁶⁸ Cases that are primarily concerned with state law should be resolved in the state courts. This division of judicial business, which I call the center-of-gravity view, makes sense in light of the relative competence and loyalties of the judges in each system.

Employing a federal decisionmaker in cases in which federal issues predominate, and a state decisionmaker in cases in which state law predominates, is likely to increase the accuracy of judicial decisionmaking. I do not mean to suggest that federal judges are incompetent to apply state law or that state judges are incompetent to apply federal law. If this were true, our judicial system could not function because both federal and state courts are often required to apply the law of other jurisdictions.²⁶⁹ The accuracy of decision making should increase, however, if cases are tried in courts that are applying the law with which they are the most familiar.²⁷⁰

Justice Scalia has suggested that Congress create specialized tribunals to handle nonessential federal claims. See Stuart Taylor, Jr., *Scalia Proposes Major Overhaul of U.S. Courts*, N.Y. TIMES, Feb. 16, 1987, § 1, at 1.

267. It has never been the law that "every person asserting a federal right is entitled to one unencumbered opportunity to litigate that right in a federal district court." *Allen v. McCurry*, 449 U.S. 90, 103-04 (1980). State court decisions on federal issues have the same collateral estoppel effect as they have in the rendering jurisdiction. *Id.* at 96. Through the bar of res judicata, state court judgments can preclude a plaintiff from asserting federal claims in federal court that he had the opportunity to raise, but did not raise, in state court. See *Migra v. Warren City Sch. Dist. Bd. of Educ.*, 465 U.S. 75, 83-85 (1984). The Supreme Court has left open the possibility that state res judicata rules may bar claims that lie within the exclusive jurisdiction of the federal courts. See *Marrese v. American Academy of Orthopaedic Surgeons*, 470 U.S. 373, 386 (1985).

268. See Twitchell, *supra* note 46, at 818 (arguing that federal jurisdiction should exist whenever "federal law plays a sufficiently central role" in light of "all of the key issues in the case, including defenses and replies").

269. Every state applies conflict of law rules to determine which state's law to apply to particular cases. The federal courts are required to apply state law to matters of substance in diversity cases. See *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938).

270. Federal judges are often uncomfortable applying state law in diversity cases. See, e.g., *Nolan v. Transocean Air Lines*, 276 F.2d 280, 281 (2d Cir. 1960) (Friendly, J.) (noting that "[o]ur principal task, in this diversity of citizenship case, is to determine what the New York courts would think the California courts would think on an issue about which neither has thought"), *vacated per curiam*, 365 U.S. 293 (1961). The common-sense conclusion that judges apply their own law more accurately is reflected in the doctrines holding that selecting a

In addition, federal judges will most likely be more sympathetic to federal law, and state judges will be more sympathetic to state law. Again, I do not mean to suggest that anything approaching judicial nullification occurs when a federal court is required to enforce state law with which it disagrees or a state court is required to do the converse. By and large, each set of courts faithfully interprets and applies the law of the other.²⁷¹ State judges, however, who are often elected and subject to majoritarian political pressures, have not always been as solicitous of federal rights as they are today.²⁷² Federal judges occasionally fail to follow state law they deem unwise.²⁷³ It is important to remember that, prior to 1988, the mandatory appellate jurisdiction of the Supreme Court covered

judge conversant with local law is a factor to be considered on transfer motions, *see* *Van Dusen v. Barrack*, 376 U.S. 612, 645 (1964), and that federal appellate courts, including the Supreme Court, are required to give deference to district judges on matters of local state law, *see, e.g.*, *Bernhardt v. Polygraphic Co. of Am.*, 350 U.S. 198, 204-05 (1956); *see also* *Factors Etc., Inc. v. Pro Arts, Inc.*, 652 F.2d 278, 283 (2d Cir. 1981) (deferring to the Sixth Circuit's view of Tennessee law), *cert. denied*, 456 U.S. 927 (1982).

271. The Supreme Court usually has great respect for the integrity of the state courts in dealing with issues of federal law. *See, e.g.*, *Stone v. Powell*, 428 U.S. 465, 494 n.35 (1976) (rejecting the assumption "that there now exists a general lack of appropriate sensitivity to constitutional rights in the trial and appellate courts of the several States"); *see also* Newman, *supra* note 266, at 769-70 (arguing that state judges have the courage to apply federal law faithfully). Today many litigants are choosing to bring their federal civil rights claims in state court, *see* Susan N. Herman, *Beyond Parity: Section 1983 and the State Courts*, 54 BROOK. L. REV. 1057, 1057-58 (1989), and some have suggested that litigants frame civil rights claims under state rather than federal law, *see* William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 491 (1977); Jon O. Newman, *The "Old Federalism": Protection of Individual Rights by State Constitutions in an Era of Federal Court Passivity*, 15 CONN. L. REV. 21, 21-22 (1982). Congress's faith in the state courts is demonstrated by the fact that most federal question cases lie within the concurrent jurisdiction of the state courts. *See, e.g.*, *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 477-78 (1981) (noting that the presumption is that the state courts have concurrent jurisdiction over federal claims); *Charles Dowd Box Co. v. Courtney*, 368 U.S. 502, 507-08 (1962) (same). Moreover, Congress has made some federal claims nonremovable. *See supra* note 16.

272. *See, e.g.*, *Allen v. McCurry*, 449 U.S. 90, 98-99 (1980) (noting that "one strong motive behind [the federal civil rights statute's] enactment was grave congressional concern that the state courts had been deficient in protecting federal rights" (citations omitted)); *Stone v. Powell*, 428 U.S. 465, 494 n.35 (1976) (noting "the unsympathetic attitude to federal constitutional claims of some state judges in years past"); *see also* Burt Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105, 1105 (1977) (challenging "the illusion that state courts will vindicate federally secured constitutional rights as forcefully as would the lower federal courts").

273. To take but one example, in *McKenna v. Ortho Pharmaceutical Corp.*, the Third Circuit held that the Ohio state court would recognize a discovery exception to its statute of limitations for certain tort actions despite powerful evidence that the state court did not take such a view. 622 F.2d 657, 669-72 (3d Cir.) (Higginbotham, J., dissenting), *cert. denied*, 449 U.S. 976 (1980). One gets the sense from reading this case that the Third Circuit believed the discovery rule was the more modern and better view.

both state cases in which the losing litigant relied on federal law and federal cases in which the losing litigant relied on state law.²⁷⁴

b. The Preference for State Courts

Some cases will not have a center of gravity. In terms of the number and relative importance of the issues involved, they will be neither predominantly federal nor predominantly state cases. These cases should be heard in state court because the division of judicial business between the federal and state courts is not symmetrical. Placing federal issues in state court poses less of a problem for our federal system than placing state issues in federal court.²⁷⁵

The Constitution does not require Congress to create federal courts inferior to the Supreme Court of the United States.²⁷⁶ The assumption of our federal system is that most cases will be heard in state court.²⁷⁷ Unlike the federal courts, the state courts are courts of plenary jurisdiction.²⁷⁸ For most of our history, the state courts have been the primary enforcers of federal claims. Except for the short-lived Midnight Judges Act, which was repealed one year after its passage in 1801,²⁷⁹ Congress did not provide the federal trial courts with general federal question jurisdiction until 1875.²⁸⁰ Congress did not eliminate the amount-in-con-

274. See Act of June 27, 1988, Pub. L. No. 100-352, §§ 2-3, 102 Stat. 662 (amending 28 U.S.C. §§ 1254, 1257).

275. The commentators have long debated whether state courts have the same capacity to determine, and respect for, federal rights as federal courts. See Erwin Chemerinsky, *Ending the Parity Debate*, 71 B.U. L. REV. 593, 593 n.2 (1991) (collecting authorities). In assessing whether state courts have parity with federal courts in addressing federal questions, the commentators distinguish between a strong and a weak sense of parity. A weak sense of parity signifies only that state courts are constitutionally adequate forums for adjudicating federal questions. A strong sense of parity signifies that state and federal courts are fungible in deciding federal issues. See, e.g., Susan N. Herman, *Why Parity Matters*, 71 B.U. L. REV. 651, 652 (1991); Michael Wells, *Behind the Parity Debate: The Decline of the Legal Process Tradition in the Law of Federal Courts*, 71 B.U. L. REV. 609, 610 (1991). I do not claim that state courts have parity with federal courts in the strong sense. See also Herman, *supra*, at 652; Wells, *supra*, at 615. I claim only that state courts have parity with federal courts in the weak sense and that the cost of employing a state decisionmaker on federal questions is less than the cost of employing a federal decisionmaker on state questions. Therefore, I propose a state decisionmaker for cases that are equally weighted between state and federal law.

276. See U.S. CONST. art. III, § 1, cl. 1 (providing that "[t]he judicial power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish").

277. In 1988, over 96% of all civil cases filed were filed in state courts. See Newman, *supra* note 266, at 769.

278. See *Aldinger v. Howard*, 427 U.S. 1, 15 (1976).

279. Act of Feb. 13, 1801, ch. 4, § 11, 2 Stat. 89, 92, *repealed by* Act of Mar. 8, 1802, ch. 8, § 1, 2 Stat. 132, 132.

280. See Act of Mar. 3, 1875, ch. 137, § 1, 18 Stat. 470, 470.

troversy requirement from the general federal question statute until 1980.²⁸¹

Moreover, it is a more serious error for the federal courts to hear a case they ought not to have heard than to decline to hear a case they might have heard. In the former situation, the federal courts have violated their limited jurisdiction and deprived the state courts of their rightful jurisdiction. In the latter circumstance, apart from the relatively unusual cases that are exclusively federal, the state courts have heard a matter that was alternatively within their jurisdiction. A number of well-established rules demonstrate that the federal courts are more concerned with erroneously exercising jurisdiction²⁸² than they are with erroneously declining jurisdiction.²⁸³

The preference for state court in mixed cases is also evidenced by the roles of federal and state courts in our federal system. When federal judges apply state law, they are applying the law of other jurisdictions. When judges decide hard cases, they are to some extent making law.²⁸⁴ A federal court deciding state issues attempts to make law in the same way the state courts would if they had the chance. A federal court is required to predict the law that the state's highest court would apply,²⁸⁵ and there is little or no opportunity for state input into the decision making process.²⁸⁶

281. See *supra* note 35.

282. The right to challenge federal jurisdiction is never waived and may be asserted by the party that invoked federal jurisdiction. See, e.g., *American Fire & Casualty Co. v. Finn.*, 341 U.S. 6, 17-19 (1951); *Capron v. Van Noorden*, 6 U.S. (2 Cranch) 126, 127 (1804). The court is required to examine the basis of its jurisdiction *sua sponte*. See, e.g., *Louisville & N.R.R. v. Mottley*, 211 U.S. 149, 152 (1908). If jurisdiction is lacking, the court is required to dismiss the case without regard to any unfairness to the parties or waste of judicial resources. See, e.g., *Peralta Shipping Corp. v. Smith & Johnson (Shipping) Corp.*, 739 F.2d 798, 804 n.6 (2d Cir. 1984), *cert. denied*, 470 U.S. 1031 (1985).

283. This concern is reflected in the fact that the removal statute is strictly construed and all doubts are to be resolved against removal. See, e.g., *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 106-07 (1941); *Boyer v. Snap-On Tools Corp.*, 913 F.2d 108, 111 (3d Cir. 1990), *cert. denied*, 111 S. Ct. 959 (1991). If a federal court decides that it lacks removal jurisdiction, there is generally no appeal. See 28 U.S.C. § 1447(d) (1988); *Thermtron Prods. v. Hermansdorfer*, 423 U.S. 336, 345-46 (1976) (holding that a remand order is reviewable only if based on a ground not specified in the removal statute).

284. See *Guaranty Trust Co. v. York*, 326 U.S. 99, 102 (1945) (discrediting the view that law is "a 'brooding omnipresence' of Reason, of which decisions [are] merely evidence and not themselves the controlling formulations"); *Erie R.R. v. Tompkins*, 304 U.S. 64, 79 (1938) (rejecting the view that there is "a transcendental body of law"). Compare H.L.A. HART, *THE CONCEPT OF LAW* 121-32 (1961) (arguing that judges make law in hard cases) with RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 81-130 (1978) (arguing that judges apply principles in hard cases).

285. See, e.g., *West v. American Tel. & Tel. Co.*, 311 U.S. 223, 226-27 (1940).

286. State participation is possible only in those states that have certification procedures.

By contrast, when state judges apply federal law, they do so in much the same way as when they apply state law. State judges do not predict the law the United States Supreme Court would utilize. Instead, they employ their best view of federal law in light of Supreme Court precedent just as the lower federal courts do.²⁸⁷ The state courts are not bound by the holdings of the inferior federal courts.²⁸⁸ If the state courts err in deciding federal issues, the Supreme Court has the ability to correct these errors in the exercise of its certiorari jurisdiction,²⁸⁹ just as it does for the lower federal courts.²⁹⁰

There is one reason for preferring a federal forum in cases that lack a clear center of gravity. If state law conflicts with federal law, a federal court is more likely to respect the supremacy of federal law.²⁹¹ However, given the state courts' role in our federal system, the general integrity of state courts, and the potential for Supreme Court review, this consideration does not justify litigating cases containing both federal and state issues in a federal forum.

See, e.g., CONN. GEN. STAT. ANN. § 51-199a (West Supp. 1992); ILL. SUP. CT. R. 20 (West 1992); N.Y. R. OF CT. § 500.17 (McKinney 1992); TEX. R. APP. P. 114 (West 1992). Even in cases applying the law of these states, certification is justified only in exceptional circumstances. *E.g.,* Bethphage Lutheran Serv. v. Weicker, 965 F.2d 1239, 1246 (2d Cir. 1992).

287. The different function state courts perform in adjudicating federal issues may be illustrated with an example. If the federal courts predict that a state supreme court rule is outmoded, they may depart from that rule if they predict that the state supreme court would currently change its view. *See, e.g.,* Bernhardt v. Polygraphic Co. of Am., 350 U.S. 198, 204-05 (1956) (Frankfurter, J., concurring); Indianapolis Airport Auth. v. American Airlines, 733 F.2d 1262, 1272 (7th Cir. 1984); Ann Arbor Trust Co. v. North Am. Co. for Life & Health Ins., 527 F.2d 526, 527 (6th Cir. 1975), *cert. denied*, 425 U.S. 993 (1976). It is improper, however, for the lower federal courts to refuse to follow a prior Supreme Court precedent on the ground that the Supreme Court would probably change its mind. *See* Rodriguez de Quijas v. Shearson/American Express, Inc. 490 U.S. 477, 484 (1989). Presumably the state courts have no more freedom than the lower federal courts to ignore existing Supreme Court precedent.

288. *See* 1B JAMES W. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 0.402(1), at 23 (2d ed. 1992).

289. *See* 28 U.S.C. § 1257(a) (1988 & Supp. I 1989 & Supp. II 1990). Although the Supreme Court is able to hear only a small percentage of all cases in which review is sought in any given year, *see The Supreme Court, 1990 Term—The Statistics*, 105 HARV. L. REV. 419, 423 (1991) (noting that during the 1990 Term, the Supreme Court disposed of 129 cases by written opinion and 112 cases by memorandum decision out of 5412 cases in which review was sought), Supreme Court review of state cases is at least a possibility. Federal cases disposing of state law issues cannot be appealed to a state appellate court.

290. *See* 28 U.S.C. § 1254(1) (1988 & Supp. I 1989 & Supp. II 1990).

291. *See* Doernberg, *supra* note 250, at 647-49.

c. The Current Jurisdictional Rules

The federal courts should have jurisdiction if and only if a case has a federal center of gravity. This approach accounts well for the cases the federal courts are currently allowed to entertain on a federal question basis. If the plaintiff asserts federal claims, any substantive defenses are usually federal.²⁹² Although federal law sometimes incorporates elements of state law,²⁹³ most cases in which the plaintiff asserts federal claims have a federal center of gravity.

Of course, the plaintiff may choose to join pendent state claims with his federal claims, and the defendant may choose to assert state defenses to these claims. These state issues may predominate over the federal issues in number and importance. When this situation occurs, however, the federal judge is always free to exercise his discretion in declining to exercise jurisdiction over the state claims and defenses.²⁹⁴

The center-of-gravity approach also supports the well-pleaded complaint rule. If the plaintiff's claims are founded wholly on state law, and the defendant asserts federal defenses, the benefits of having federal or state adjudication are equally weighted. Any advantage in having the federal defenses considered by a federal judge is balanced by the cost of losing a state decisionmaker for the state claims.

If the well-pleaded complaint rule usually resulted in a tie between the benefits of federal and state court adjudication, it would be proper to break this tie in favor of state court jurisdiction.²⁹⁵ However, a tie is not the general result. It is the most generous result from the perspective of federal jurisdiction. Many cases involving state claims and federal de-

292. Because federal law must prevail over contrary state law, state law will not usually provide a defense to federal claims. To fill gaps in statutory schemes, the federal courts will often create federal common law to deal with potential defenses to congressionally created claims. *E.g.*, *Dice v. Akron, C. & Y.R.R.*, 342 U.S. 359, 361-62 (1952) (holding that the validity of the release of a claim under the Federal Employers' Liability Act, 45 U.S.C. §§ 51-60 (1946 & Supp. II 1948), is governed by federal common law).

293. *See, e.g.*, *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 726-29 (1979) (incorporating state law to determine priority of liens under a federal lending program).

294. *See United Mine Workers v. Gibbs*, 383 U.S. 715, 726 (1966). The center-of-gravity test does not explain the federal courts' jurisdiction over state-created claims that contain a substantial federal element. In such a case, a number of the plaintiff's claims may turn on important issues of state law and the defendant may have state law defenses. The center of gravity in the majority of these cases seems to be state law. Perhaps for this reason, the Supreme Court has sharply limited plaintiffs' ability to gain access to a federal forum by incorporating federal elements into state claims. *See supra* note 10; *see also* Linda R. Hirshman, *Whose Law Is It, Anyway? A Reconsideration of Federal Question Jurisdiction over Cases of Mixed State and Federal Law*, 60 *IND. L.J.* 17, 63-72 (1984) (arguing for a return to the rule that a case arises under the law that creates the claim).

295. *See supra* text accompanying notes 275-291.

fenses will also involve state defenses. Thus, a majority of cases in which the plaintiff's claims are based wholly on state law should be heard in state court.²⁹⁶

Implementing a bright-line test such as the well-pleaded complaint rule inevitably results in some cases in which federal law predominates being heard in state court.²⁹⁷ Rather than adopting a bright-line rule, a court might inquire on a case-by-case basis whether a particular case is predominantly federal, based on relevant quantitative and qualitative factors.²⁹⁸ Adopting such a case-by-case approach would maximize accuracy in identifying predominantly federal cases. The gains in accuracy would, however, be outweighed by substantial efficiency costs.²⁹⁹

Under an ad hoc system it would be impossible to predict which federal issues a federal judge would deem sufficiently important to warrant the exercise of federal jurisdiction. As a consequence, some plaintiffs would inaccurately gauge the judge's sense of the case and file claims that would be dismissed. Others would view the unpredictability of the jurisdictional rules as an incentive to litigate.³⁰⁰ The well-pleaded com-

296. See *Franchise Tax Bd. v. Construction Laborers Vacation Trust*, 463 U.S. 1, 11 (1983) (noting that "[f]or many cases in which federal law becomes relevant only insofar as it sets bounds for the operation of state authority, the well-pleaded complaint rule makes sense as a quick rule of thumb"); Paul M. Bator, *The State Courts and Federal Constitutional Litigation*, 22 WM. & MARY L. REV. 605, 611-12 (1981) (arguing against allowing removal of state criminal or administrative proceedings based on federal constitutional defenses); Jeffery L. Norton, Note, *Removal Doctrine Reaffirmed: Franchise Tax Board v. Construction Laborers Vacation Trust*, 70 CORNELL L. REV. 557, 571 (1985) (arguing that "[t]he well-pleaded complaint rule properly strikes the balance between state and federal jurisdiction . . . by excluding cases predominantly founded upon state law from federal courts").

297. For example, in *Franchise Tax Board* and *Louisville & N.R.R. v. Mottley*, 211 U.S. 149 (1908), the Supreme Court denied removal under the well-pleaded complaint rule even though the only disputed issues related to federal defenses. See *Franchise Tax Bd.*, 463 U.S. at 12; *Mottley*, 211 U.S. at 151-52.

298. See Cohen, *supra* note 250, at 916 (suggesting an ad hoc test for federal question jurisdiction that would consider: the effect of recognizing jurisdiction on the federal docket, the likelihood that a class of cases will turn on federal issues, the degree of federal expertise in particular areas, and the need for a sympathetic federal tribunal for particular types of cases).

299. See Michael B. Thornton, Comment, *Intimations of Federal Removal Jurisdiction in Labor Cases: The Pleadings Nexus*, 1981 DUKE L.J. 743, 761-64 (arguing against applying an ad hoc test to determine removal under the artful pleading doctrine). The well-pleaded complaint rule can itself be difficult to apply. For example, the rule is sometimes problematic in declaratory judgment cases in which the court must reconstruct the underlying coercive action and ask whether the party that would have been the plaintiff in the coercive action could have gained access to federal court. See, e.g., *Franchise Tax Bd.*, 463 U.S. at 13-22. However, in most cases, the application of the well-pleaded complaint rule is straightforward. Moreover, even in hard cases, the jurisdictional inquiry can be accomplished at the outset on the pleadings without having to consider any questions connected to the merits.

300. Judge Newman of the Second Circuit has suggested a method that minimizes the efficiency costs of discretionary review of cases in which federal jurisdiction might attach.

plaint rule avoids the large costs of case-by-case investigation by fairly approximating the cases that belong in the federal courts.

B. The Artful Pleading Doctrine as an Exception to the Well-Pleaded Complaint Rule

Although the well-pleaded complaint rule is generally well founded, there are explicit exceptions to the rule.³⁰¹ The rule has also been manipulated to allow federal jurisdiction based upon what are essentially federal defenses.³⁰² This section examines whether the artful pleading doctrine should stand as an exception to the well-pleaded complaint rule and concludes that it should not.

(1) Importance of the Federal Interests

The artful pleading doctrine is arguably a strong candidate for an exception to the well-pleaded complaint rule.³⁰³ The rule allows removal based upon federal defenses that are dispositive of the plaintiff's state

Under Judge Newman's proposal, a party seeking access to the federal courts would submit an affidavit detailing the reasons his case is worthy of federal consideration. A federal appellate judge would summarily dispose of the petition without engaging in fact-finding or issuing an opinion. The judge's decision would be final and unreviewable. See Newman, *supra* note 266, at 771-73.

301. Federal officials may remove cases based upon their federal defenses to state claims. See 28 U.S.C. § 1442(a) (1988); *Mesa v. California*, 489 U.S. 121, 139 (1989). Removal may be predicated upon the existence of certain federal civil rights defenses to state claims. See 28 U.S.C. § 1443 (1988); *Georgia v. Rachel*, 384 U.S. 780, 805-06 (1966). The Federal Deposit Insurance Corporation may remove cases based on federal defenses. See 12 U.S.C. § 1819(b)(2)(B) (1988 & Supp. I 1989 & Supp. II 1990); *Lazuka v. FDIC*, 931 F.2d 1530, 1535 (11th Cir. 1991).

302. Just as a plaintiff may not gain access to federal court by anticipating defenses, a potential defendant may not gain access to federal court by seeking a declaratory judgment that any state claims against him are barred by federal law. See *Franchise Tax Bd. v. Construction Laborers Vacation Trust*, 463 U.S. 1, 14-19 (1983). If the potential defendant is able to seek an injunction on the ground that enforcement of state law would violate federal law, however, federal question jurisdiction exists. See, e.g., *Shaw v. Delta Air Lines*, 463 U.S. 85, 96 n.14 (1983); *Ex parte Young*, 209 U.S. 123, 160-62 (1908). Moreover, if the potential defendant has the capacity to seek an injunction against state regulation that is allegedly inconsistent with federal law, he can also get a declaratory judgment to this effect because there is a coercive action involving a substantial federal question in which he would be a plaintiff. See *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 298 (1988); *Lawrence County v. Lead-Deadwood Sch. Dist.*, 469 U.S. 256, 259 n.6 (1985).

303. See Segreti, *Vesting the Whole*, *supra* note 92, at 554-63 (arguing that federal preemption defenses should be heard in federal court); Twitchell, *supra* note 46, at 818-19 (arguing that the well-pleaded complaint rule loses much of its utility in preemption disputes); Blumenfeld, *supra* note 64, at 356-61 (arguing that federal rather than state courts should decide issues of federal preemption); cf. Dieckmann, *supra* note 252, at 158-75 (arguing that the federal courts should have jurisdiction to resolve certain declaratory judgment actions relating to the scope of federal preemption).

claims.³⁰⁴ If federal preemption or res judicata applies, the plaintiff has no state claims left to try in state court. If federal preemption or res judicata does not apply, the state claims can be remanded to state court for trial before a state judge.

Moreover, the artful pleading doctrine implicates important federal policies.³⁰⁵ Under the preemption branch of the artful pleading doctrine, removal is allowed either because Congress has preempted a state claim and replaced it with a parallel federal claim or because Congress has wholly preempted a particular area of the law.³⁰⁶ In either case, Congress has manifested a special concern that an entire area of the law be exclusively federal.³⁰⁷ Similarly, protecting the res judicata impact of federal judgments was of such significance to Congress that it amended the Anti-Injunction Act. This amendment overruled the Supreme Court's holding that the federal courts could not enjoin state courts from conducting proceedings barred by the res judicata impact of a prior federal judgment.³⁰⁸

Despite the importance of the federal policies implicated by the artful pleading doctrine, they do not justify an exception to the well-pleaded complaint rule. These federal policies are no more important than those policies furthered by other federal defenses that do not allow removal.³⁰⁹ The federal interests protected by the artful pleading doctrine also cannot outweigh both the cost of losing a state decisionmaker in cases that, as a class, are likely to revolve around state law and the cost to our federal system, which presumes that cases will be tried in state court absent a compelling reason to exercise federal jurisdiction.

304. See Doernberg, *supra* note 250, at 656-59 (arguing that either party should be able to obtain a federal forum for any case in which a federal issue is outcome-determinative); Herbert Wechsler, *Federal Jurisdiction and the Revision of the Judicial Code*, 13 LAW & CONTEMP. PROBS. 216, 233-34 (1948) (arguing that dispositive federal defenses should provide the basis for removal jurisdiction).

305. See Segreti, *Vesting the Whole*, *supra* note 92, at 540 (arguing that "[t]here are few federal questions of more significance to our system of federalism than whether federal law displaces state law").

306. See *supra* text accompanying notes 47-49, 83-90.

307. See Blumenfeld, *supra* note 64, at 359 (arguing that federal preemption "indicates that Congress is according special significance to the preemptive body of federal law").

308. See 17 WRIGHT ET AL., *supra* note 9, § 4226, at 540-45 (2d ed. 1988). Of course, the existence of the injunctive remedy also reduces the necessity of allowing removal to protect the scope of a prior federal judgment. See *supra* text accompanying notes 238-240.

309. See Moss, *supra* note 51, at 1630 (arguing that "cases that fall under the complete preemption doctrine are not clearly distinguishable from all other cases in which federal laws are asserted in defense of state claims"). For example, the federal defenses in *Louisville & N.R.R. v. Mottley*, 211 U.S. 149 (1908), were of constitutional magnitude. See *id.* at 151-52.

(2) *Judicial Efficiency*

Considerations of judicial efficiency also suggest that the artful pleading doctrine should not be recognized as an exception to the well-pleaded complaint rule. The removal process always results in some waste of state resources.³¹⁰ Although rulings by the state court remain in effect after removal, they may be reexamined by the federal district court.³¹¹ Under current law, dual proceedings are kept to a minimum because removal must be sought within thirty days from the time a case first becomes removable.³¹² Therefore, removal usually occurs, if at all, within thirty days from the filing or service of the complaint.

Removal based on the contents of a defendant's answer would allow for a more significant delay. Many states follow the federal rule that a motion to dismiss tolls the time in which a defendant must file an answer.³¹³ Although the federal courts would presumably require the filing of an immediate answer to ensure jurisdiction if the well-pleaded complaint rule were eliminated,³¹⁴ there would be no reason for the state courts to impose this requirement because they are courts of plenary jurisdiction. Since the defendant controls the timing of his answer, and since there is no time limit on the removal of federal question cases,³¹⁵ removal would be allowed until the state trial court decided all the dispositive motions addressed to the complaint.³¹⁶

Changing the law to allow removal based on federal defenses would also waste federal judicial resources in a substantial number of cases. The artful pleading doctrine often requires a federal court to determine the merits of a federal defense as a condition of exercising jurisdiction.³¹⁷

310. See Akhil R. Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U. L. REV. 205, 269-70 (1985).

311. See 28 U.S.C. § 1450 (1988).

312. See 28 U.S.C. § 1446(b) (1988).

313. *E.g.*, MD. R. Civ. P. 2-321(c) (Michie 1992); N.Y. CIV. PRAC. L. & R. 3211(f) (McKinney 1992).

314. See *supra* text accompanying notes 260-264.

315. Cf. 28 U.S.C. § 1446(b) (1988) (providing that removal based on diversity of citizenship must occur within one year of commencement of the action).

316. Changing the law to allow removal based on federal defenses may allow abuse by state court defendants. Since defendants control the timing of their answer, they could gauge the sympathies of a state judge during preliminary proceedings, or simply delay for an extended period before filing an answer and removing the case based on federal defenses. Current law does not permit these potential abuses. Under current law, the circumstances that allow removal subsequent to the filing of the complaint are within the control of persons other than the defendant. If a case is not removable based on the complaint, it may become removable based on amendments to the complaint, such as the inclusion of a federal claim, or actions by the state court, such as the dismissal of a nondiverse party.

317. The preemption branch of the artful pleading doctrine allows remand in some cases

If a federal district court holds that the plaintiff's state claims are barred, and that holding is not disturbed on appeal, the outcome is efficient. Federal courts have decided a federal issue, and there are no state issues to be tried.

However, if a federal district court holds that federal law does not bar the plaintiff's state claims and remands the case, the outcome is inefficient. The district court's ruling on the merits of the federal defense is not preclusive and the defense may be reasserted in state court.³¹⁸ Moreover, if a district court's finding that federal law bars the plaintiff's state

without requiring a determination of the merits of a federal defense. Removal, however, always requires a finding of federal preemption. Under the replacement preemption model, the district court is required to reach the merits of the preemption issue once it determines that a federal claim exists that arguably preempts the plaintiff's state claims. See *Twitchell*, *supra* note 46, at 865. Under the complete preemption model, the district court can avoid the preemption question only if it decides that the plaintiff's state claims are clearly outside any areas that Congress has wholly occupied. See *supra* note 104 and accompanying text; *supra* text accompanying notes 113, 125. The *res judicata* view of the dual filing branch of the artful pleading doctrine equates the jurisdictional and *res judicata* issues. See *supra* text accompanying note 211. Only the election-of-remedies view of the dual filing branch of the doctrine potentially allows removal without considering the merits of a federal defense. However, even this theory may require the district court to decide issues that are analytically indistinguishable from the *res judicata* inquiry. See *supra* text accompanying notes 199-202.

318. Cf. *BATOR*, *supra* note 9, at 618 (arguing against allowing federal courts to review federal defenses separately when such determinations will not be binding on the state courts). The district court's remand order is generally not reviewable in a court of appeals. See 28 U.S.C. § 1447(d) (1988); *Thermtron Prods. v. Hermansdorfer*, 423 U.S. 336, 345-46 (1976) (noting that review of remand orders is proper only if the remand is based on grounds not specified in the removal statute); *Hansen v. Blue Cross*, 891 F.2d 1384, 1390 (9th Cir. 1989) (refusing to assert appellate jurisdiction over a remand decision without deciding whether such decision is preclusive in state court). For a ruling to be preclusive, the losing party must have had the ability to seek appellate review. *Gelb v. Royal Globe Ins. Co.*, 798 F.2d 38, 44-45 (2d Cir. 1986), *cert. denied*, 480 U.S. 948 (1987). Because the court of appeals normally has no ability to review the remand order by discretion or otherwise, federal rulings on the merits of federal defenses resulting from the artful pleading inquiry should not be preclusive. See *Whitman v. Raley's Inc.*, 886 F.2d 1177, 1179, 1182 (9th Cir. 1989) (noting that a district court's remand of state claims on the ground that they were "not preempted in any degree" by federal law did not "have any preclusive effect on the substantive matters before the state court"); *Survival Sys. v. United States Dist. Ct.*, 825 F.2d 1416, 1418 (9th Cir. 1987) (noting that federal preemption could still be raised as a defense in state court to state claims remanded by the district court on the ground that they were not preempted by federal law), *cert. denied*, 484 U.S. 1042 (1988). But see *Yamachika*, *supra* note 51, at 351. In *In re Life Insurance Co. of North America*, 857 F.2d 1190 (8th Cir. 1988), the Eighth Circuit held that a remand order was reviewable due to the preclusive effect of the district court's rulings on a preemption defense. *Id.* at 1193. The Eighth Circuit has the matter backwards. Because the remand order is not reviewable, it has no preclusive effect. Moreover, when deciding federal issues, a state court must follow only the higher state courts and the Supreme Court of the United States. A state court is not required to follow federal district courts or federal courts of appeals. See *supra* text accompanying note 288. Therefore, a district court's remand order is not binding on the state courts as a matter of *stare decisis*.

claims is ultimately reversed by a court of appeals or the United States Supreme Court, it may take a substantial period of time before the plaintiff is able to return to state court with his state claims.

In addition, the artful pleading doctrine wastes federal judicial resources because it is exceedingly difficult to apply.³¹⁹ This difficulty accounts in large part for the huge number of decided cases involving the doctrine.³²⁰ Lack of clarity in the law tends to encourage litigation. Disputes among and within circuits regarding the proper application of both branches of the artful pleading doctrine illustrate the problems courts face in applying the artful pleading doctrine.³²¹ Any benefits resulting from having federal courts determine federal preemption and res judicata defenses are outweighed by the large costs of determining the forum in which the case should be tried.³²²

A possible solution to the judicial efficiency problem is to employ methods similar to those now utilized by the federal courts in divorcing jurisdictional considerations from the merits when jurisdiction rests on the plaintiff's claims.³²³ Under this approach either the plaintiff or the defendant would be favored for jurisdictional purposes. If the plaintiff were favored, removal would not be allowed based on federal preemption or res judicata unless the plaintiff's claims were clearly barred by one of these defenses.³²⁴ This approach has two potential virtues: a state decisionmaker would be presiding over what are likely to be predominantly state law cases, and the defendant would have access to a federal forum in those cases in which the federal interest is paramount. The plaintiff's preference rule, however, has been squarely rejected by the Supreme Court.³²⁵

If the defendant were favored, removal would be allowed whenever it was fairly arguable that the plaintiff's claims were barred by federal preemption or res judicata, and the federal court would be authorized to adjudicate the state claims if they were not barred. The defendant's preference rule has been used in the small number of cases in which explicit

319. See, e.g., *Bartholet v. Reishauer A.G.*, 953 F.2d 1073, 1075 (7th Cir. 1992) (describing the artful pleading doctrine as "a doctrine only a judge could love").

320. See *supra* notes 48-49, 131-132.

321. See *supra* notes 133-142 and accompanying text; *supra* text accompanying notes 192-221.

322. See *Bartholet*, 953 F.2d at 1075 (arguing that "[e]xtended proceedings to determine where to litigate are seldom worth the cost but are inevitable under the current rules").

323. See *supra* note 94 and accompanying text.

324. See *Floyd*, *supra* note 240, at 19 (arguing that "the artful pleading doctrine should be invoked to support removal only when the state law claims are frivolous").

325. See *supra* note 103.

exceptions to the well-pleaded complaint rule have been established.³²⁶ This rule also parallels the disposition of state claims in the pendent jurisdiction context: When substantial federal resources have been expended, the federal court may proceed to adjudicate the state claims even though the federal claim on which jurisdiction was premised has been dismissed.³²⁷

The defendant's preference rule would require the federal courts to allow removal of state claims based upon the mere possibility of federal preclusion. When the possibility of federal preclusion is small, the federal interest in enforcing federal preemption and *res judicata* is outweighed by both the cost of losing a state decisionmaker in cases that are likely to revolve around state law and the general presumption in favor of state court jurisdiction.³²⁸

Moreover, the artful pleading context is distinguishable from other situations in which removal is allowed based on the assertion of federal defenses. Although Congress has explicitly allowed removal based on the assertion of certain civil rights defenses,³²⁹ this exception to the well-pleaded complaint rule has been construed narrowly and does not portend a large increase in federal question jurisdiction.³³⁰

The other statutes that have been construed to create exceptions to the well-pleaded complaint rule appear to allow federal officers or entities to remove state claims based on the parties' status.³³¹ Under these statutes, the courts have imposed as an additional requirement that the removing parties have a colorable federal defense. This requirement serves, in part, to ensure that these statutes fall within constitutional paramete-

326. See *Mesa v. California*, 489 U.S. 121, 139 (1989) (holding that removal by federal officials under 28 U.S.C. § 1442(a) (1988) must be based on the assertion of a colorable federal defense); *Georgia v. Rachel*, 384 U.S. 780, 804-05 (1966) (allowing removal under 28 U.S.C. § 1443 (1964) based on the assertion of a defense under any law specifically defending civil rights in terms of racial equality); *Lazuka v. FDIC*, 931 F.2d 1530, 1535 (11th Cir. 1991) (applying *Mesa* to the FDIC removal statute).

327. See *United Mine Workers v. Gibbs*, 383 U.S. 715, 725-26 (1966); *Floyd*, *supra* note 240, at 28 n.184 (collecting cases).

328. See RICHARD A. POSNER, *THE FEDERAL COURTS: CRISIS AND REFORM* 190 (1985) (arguing that "[i]t would be a serious mistake to make all cases in which a federal defense was asserted removable as a matter of right. In many cases the federal defense would have little merit—would, indeed, have been concocted purely to confer federal jurisdiction").

329. See 28 U.S.C. § 1443 (1988).

330. See, e.g., *Johnson v. Mississippi*, 421 U.S. 213, 222-27 (1975); *City of Greenwood v. Peacock*, 384 U.S. 808, 831-34 (1966).

331. See 12 U.S.C. § 1819 (b)(2)(A) (1988 & Supp. I 1989 & Supp. II 1990) (providing that "all suits of a civil nature at common law or in equity to which the [FDIC] is a party shall be deemed to arise under the laws of the United States"); 28 U.S.C. § 1442(a) (1988) (allowing removal by "[a]ny officer of the United States" who is sued or prosecuted "for any act under color of such office").

ters.³³² Thus, allowing removal based on colorable federal defenses has generally involved a judicial attempt to narrow rather than expand the scope of removal jurisdiction.

The artful pleading context can also be distinguished from the pendent jurisdiction context. Although federal courts are permitted to adjudicate pendent state claims in cases in which no federal issues remain, this situation occurs only when the plaintiff chose, or had the opportunity to choose, a federal forum. Pendent jurisdiction gives the plaintiff the option to litigate all his claims in federal court. To further judicial efficiency, a federal court may be required to adjudicate state claims when there are no federal claims left in the suit.³³³ There is no equivalent compensation to plaintiffs in the artful pleading context. In the artful pleading context, the plaintiff derives no benefit from the existence of a federal forum.

(3) Congressional Intent

Finally, the artful pleading doctrine is inconsistent with the will of Congress. The scope of federal question jurisdiction is nothing more than an application of the projected intent of Congress. The general federal question statute is magisterially silent on which cases arise under federal law, on whether the well-pleaded complaint rule is generally a good doctrine, and on whether the artful pleading doctrine is a legitimate exception to the well-pleaded complaint rule.

There is support for the theory that Congress intended to vest the federal district courts with the whole of constitutional federal question jurisdiction when it passed the first federal question statute in 1875.³³⁴ Soon after its passage, however, the federal courts gave a more restricted reading to this statute, and the law has remained the same for over one

332. *Mesa v. California*, 489 U.S. 121, 137-39 (1989). *Mesa* appears to be undercut by the Supreme Court's decision in *American National Red Cross v. S.G.*, 112 S. Ct. 2465, 2466-67 (1992), in which the Court held that the Red Cross could remove cases based on its status under a federal statute that permitted it to sue and be sued in federal court. The Court's brief treatment of the scope of constitutional federal question jurisdiction, *id.* at 2472, did not include a discussion of *Mesa*.

333. It should also be noted that in the pendent jurisdiction context, dismissal of any federal claims is on the merits and those claims may not be relitigated in any state proceeding. See *supra* note 58. Thus, although pendent jurisdiction may create delay in getting state claims back to state court, and may sometimes require federal courts to adjudicate cases between nondiverse parties that involve only state law, allowing pendent jurisdiction never involves relitigation of the federal claim upon which jurisdiction was initially based.

334. See *Collins*, *supra* note 15, at 722-23.

hundred years.³³⁵ Perhaps congressional silence may be interpreted as a tacit affirmation of the validity of the well-pleaded complaint rule, especially in light of the rule's longtime acceptance.³³⁶ The courts have often viewed the rule as beyond question due to its ancient lineage.³³⁷ The well-pleaded complaint rule's ancient lineage also helps to explain the courts' hesitancy in admitting that the artful pleading doctrine is inconsistent with the rule.³³⁸

Inferring Congressional intent based on Congressional silence is a hazardous enterprise. Congress may have wanted the courts to use sound policy in determining the exact scope of federal jurisdiction, or Congress may simply have focused its attention on items less esoteric than federal jurisdiction. Congressional silence cuts both ways in the artful pleading context. Just as Congress may have accepted the well-pleaded complaint rule as a result of its inaction, Congress may now have accepted the artful pleading doctrine, which is approaching its twenty-fifth anniversary.³³⁹ This interpretation is questionable in that Congress has adopted explicit statutory exceptions to the well-pleaded complaint rule.³⁴⁰ A fair interpretation is that Congress intends other cases involving federal defenses to be nonremovable. Consequently, the artful pleading doctrine should not continue to be seen as an exception to the well-pleaded complaint rule.

VI. Conclusion

In 1968, the Supreme Court in *Avco* adopted the artful pleading doctrine. The Court gave little consideration to the merits of the doctrine or the manner in which the doctrine affected established law. In circular fashion, it noted only that the plaintiff's claim was "controlled by federal substantive law."³⁴¹ Most courts and commentators have accepted without question the pristine form of the artful pleading doctrine exemplified

335. See *Metcalf v. Watertown*, 128 U.S. 586, 589-90 (1888) (denying the plaintiff access to federal court on the basis of potential federal defenses).

336. When Congress amends a statute and does nothing to change well-accepted judicial precedent, it is deemed to accept that precedent. See *Herman & MacLean v. Huddleston*, 459 U.S. 375, 385-86 (1983); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 381-82 (1982). The federal question statute has been amended numerous times since the *Metcalf* decision in 1888. E.g., Pub. L. No. 96-486, § 2(a), 94 Stat. 2369 (1980) (eliminating the amount in controversy requirement).

337. See, e.g., *Franchise Tax Bd.*, 463 U.S. at 9-12.

338. See *supra* note 216.

339. See *Twitchell*, *supra* note 46, at 869 (arguing that "[i]t is too late to restrict all recharacterization removal").

340. See *supra* note 301.

341. *Avco*, 390 U.S. at 560.

by *Avco*. A close examination of *Avco* reveals that the artful pleading doctrine is inconsistent with traditional jurisdictional principles and that those principles, rather than the doctrine established in *Avco*, state the better policy. The expansion of the artful pleading doctrine suggested by *Federated Department Stores*, *Franchise Tax Board*, and their progeny is not required by *Avco*. These cases mark an extreme departure from well-considered law.

As a consequence, the Supreme Court should reconsider its ill-advised departure from traditional jurisdictional principles in *Avco*. At the very least, the Court should restrict the artful pleading doctrine to those cases in which federal law both preempts state law and provides replacement federal claims. The Court should also reject the complete preemption model and overrule the jurisdictional holding of *Federated Department Stores*. Failing action by the Court, Congress would do well to eliminate a doctrine that is contrary to sound jurisdictional theory, exceedingly difficult to apply, and the bane of judges and litigants alike.

